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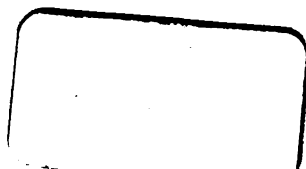
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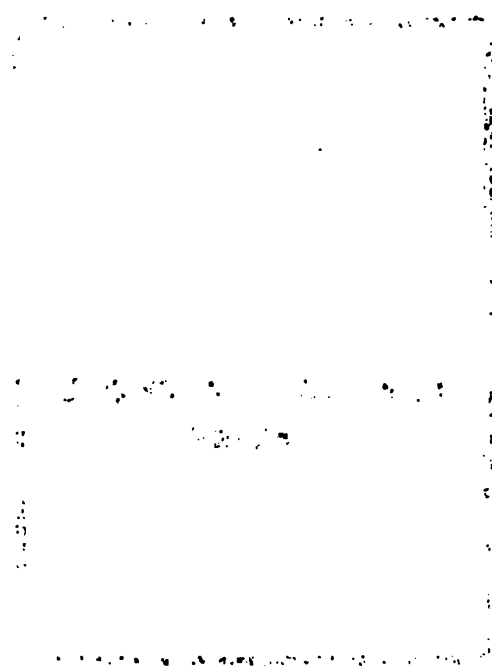
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7
REPORTS OF CASES

DETERMINED IN THE

APPELLATE COURTS
OF ILLINOIS

WITH A DIRECTORY OF THE JUDICIARY OF THE STATE,
CORRECTED TO JUNE 29, 1906, AND A TABLE OF
CASES REVIEWED BY THE SUPREME COURT
TO THE DATE OF THE PUBLICA-
TION OF THIS VOLUME.

VOL. CXX
A. D. 1906

LAST FILING DATES OF REPORTED CASES:

FIRST DISTRICT, MAY 29, 1905;
SECOND DISTRICT, MAY 27, 1905;
THIRD DISTRICT, APRIL 20, 1905.

EDITED BY

W. CLYDE JONES AND KEENE H. ADDINGTON,

AUTHORS OF JONES & ADDINGTON'S SUPPLEMENTS TO
STARR & CURTIS'S ANNOTATED ILLINOIS STATUTES.

CHICAGO
CALLAGHAN & COMPANY
1906

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Rec. Aug. 10., 1906.

Stereotyped and Printed
by the
Chicago Legal News Company.

DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO JUNE 29, 1906.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

JUSTICES.

First District—ALONZO K. VICKERS.....Vienna.
Second District—WILLIAM M. FARMER.....Vandalia.
Third District—JACOB W. WILKIN.....Danville.
Fourth District—GUY C. SCOTT.....Aledo.
Fifth District—JOHN P. HAND.....Cambridge.
Sixth District—JAMES H. CARTWRIGHT.....Oregon.
Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Scott is the present Chief Justice.

CLERK.

CHRISTOPHER MAMER, Springfield.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

REPORTERS.

W. CLYDE JONES and KEENE H. ADDINGTON, comprising the law firm of Jones & Addington, 100 Washington street, Chicago.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Alfred R. Porter, Ashland Block, Chicago.

FRANCIS ADAMS, Presiding Justice, Ashland Block, Chicago.

JESSE HOLDOM, Justice, Ashland Block, Chicago.

EDWARD O. BROWN, Justice, Ashland Block, Chicago.

BRANCH APPELLATE COURT.*

FIRST DISTRICT.

FREDERICK A. SMITH, Presiding Justice, Ashland Block, Chicago.

FRANK BAKER, Justice, Ashland Block, Chicago.

HENRY V. FREEMAN, Justice, Ashland Block, Chicago.

APPELLATE COURTS—(CONTINUED.)

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, LaSalle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

DORRANCE DIBELL, Presiding Justice, Joliet.

GEORGE W. THOMPSON, Justice, Galesburg.

HENRY B. WILLIS, Justice, Elgin.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Piatt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermilion.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield.

FRANK D. RAMSAY, Presiding Justice, Morrison.

JAMES S. BAUME, Justice, Galena.

LESLIE D. PUTERBAUGH, Justice, Peoria.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1917. Hurd's Statutes, 1897, 508, Laws of 1897, 185.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.

CLERK—Albert C. Millsbaugh, Mount Vernon.

COLOSTIN D. MYERS, Presiding Justice, Bloomington.

JAMES A. CREIGHTON, Justice, Springfield.

HARRY HIGBEE, Justice, Pittsfield.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows:*

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

† ALONZO K. VICKERS, Vienna.

WARREN W. DUNCAN, Marion.

WILLIAM N. BUTLER, Cairo.

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

JUDGES.

ENOCH E. NEWLIN, Robinson.

PRINCE A. PEARCE, Carmi.

JACOB R. CREIGHTON, Fairfield.

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville.

ROBERT D. W. HOLDER, Belleville.

CHARLES T. MOORE, Nashville.

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

† WILLIAM M. FARMER, Vandalia.

TRUMAN E. AMES, Shelbyville.

SAMUEL L. DWIGHT, Centralia.

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

JUDGES.

JAMES W. CRAIG, Mattoon.

E. R. E. KIMBROUGH, Danville.

MORTON W. THOMPSON, Danville.

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

JUDGES.

WILLIAM G. COCHRAN, Sullivan.

OLON PHILBRICK, Champaign.

WILLIAM C. JOHNS, Decatur.

* Laws 1897, 188.

† Resigned. Elected Judge Supreme Court June 4, 1906.

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield.
ROBERT B. SHIRLEY, Carlinville.
OWEN P. THOMPSON, Jacksonville.

Eighth Circuit.—The counties of Adama, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

HARRY HIGBEE, Pittsfield.
THOMAS N. MEHAN, Mason City.
ALBERT AKERS, Quincy.

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

GEORGE W. THOMPSON, Galesburg.
JOHN A. GRAY, Canton.
ROBERT J. GRIER, Monmouth.

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria.
THEODORE N. GREEN, Pekin.
NICHOLAS E. WORTHINGTON, Peoria.

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington.
GEORGE W. PATTON, Pontiac.
THOMAS M. HARRIS, Lincoln.

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet.
ALBERT O. MARSHALL, Watseka.
FRANK L. HOOPER, Joliet.

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

CHARLES BLANCHARD, Ottawa.
SAMUEL C. STOUGH, Morris.
RICHARD M. SKINNER, Princeton.

Fourteenth Circuit.—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

WILLIAM H. GEST, Rock Island.
FRANK D. RAMSAY, Morrison.
EMERY C. GRAVES, Geneseo.

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

RICHARD S. FARRAND, Dixon.
JAMES S. BAUME, Galena.
OSCAR E. HEARD, Freeport.

Sixteenth Circuit.—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.
CHARLES A. BISHOP, Sycamore.
LINUS C. RUTH, Hinsdale.

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

ARTHUR H. FROST, Rockford.
CHARLES H. DONNELLY, Woodstock.
ROBERT W. WRIGHT, Belvidere.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, *ex officio*, of the Criminal Court.

CIRCUIT COURT.

ACTING CLERK—James J. Gray, Fort Dearborn Building, Chicago.

JUDGES.

GEORGE A. CARPENTER,
RICHARD S. TUTHILL,
RICHARD W. CLIFFORD,
FRANK BAKER,
FRANCIS ADAMS,
THOMAS G. WINDES,
MERRITT W. PINCKNEY,

JOHN GIBBONS,
EDWARD O. BROWN,
LOCKWOOD HONORE,
GEORGE KERSTEN,
JULIAN W. MACK,
FREDERICK A. SMITH,
CHARLES M. WALKER.

SUPERIOR COURT.

CLERK—Charles W. Vail, Fort Dearborn Building, Chicago.

JUDGES.

JOSEPH E. GARY,
BEN M. SMITH,
THEODORE BRENTANO,
GEORGE A. DUPUY,
ALBERT C. BARNES,
ARTHUR H. CHETLAIN,

HENRY V. FREEMAN,
FARLIN Q. BALL,
AXEL CHYTRAUS,
JESSE HOLDOM,
MARCUS KAVANAGH,
WILLARD M. McEWEN.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 87, R. S., and when so established have concurrent jurisdiction within the city, with the Circuit Courts, in all civil and criminal cases, except treason and murder, and in appeals from justices of the peace residing within the city. (*Hercules Iron Works v. E., J. & E. Ry. Co.*, 141 Ill. 497.)

THE CITY COURT OF ALTON.

JAMES E. DUNNEGAN, Judge. **FRANCIS BRANDEWEIDE, Clerk.**

THE CITY COURT OF AURORA.

JOHN L. HEALY, Judge. **FRANK W. GREENAWAY, Clerk.**

THE CITY COURT OF CANTON.

P. W. GALLAGHER, Judge. **W. S. GLEASON, Clerk.**

THE CITY COURT OF CHICAGO HEIGHTS.

HOMER ABBOTT, Judge. **EDWARD H. KIRGIS, Clerk.**

THE CITY COURT OF EAST ST. LOUIS.

W. J. N. MOYERS, Judge. **THOMAS J. HEALY, Clerk.**

THE CITY COURT OF ELGIN.

JOHN L. HEALY, Judge. **CHARLES S. MOTE, Clerk.**

THE CITY COURT OF LITCHFIELD.

PAUL MCWILLIAMS, Judge. **HARRY L. BALLARD, Clerk.**

THE CITY COURT OF MATTOON.

HORACE S. CLARK, Judge. **THOMAS M. LYTTLE, Clerk.**

THE CITY COURT OF PANA.

JOSIAH P. HODGE, Judge. **DELOSS TRAVIS, Clerk.**

THE CITY COURT OF ZION CITY.

V. V. BARNES, Judge. **O. L. SPRECHER, Clerk.**

(6) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, La Salle, Peoria, Sangamon, St. Clair and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72.)

JUDGES.	COUNTIES.	COUNTY SEATS.
CHARLES B. McCRORY.....	Adams.....	Quincy.
WILLIAM S. DEWEY.....	Alexander.....	Cairo.
JOSEPH STORY.....	Bond.....	Greenville.
WM. C. DE WOLF, JR.....	Boone.....	Belvidere.
S. A. HUBBARD.....	Brown.....	Mt. Sterling.
JOE A. DAVIS.....	Bureau.....	Princeton.
F. I. BIZAILLON.....	Calhoun.....	Hardin.
ALVA F. WINGERT.....	Carroll.....	Mt. Carroll.
DARIUS N. WALKER.....	Cass.....	Virginia.
CALVIN C. STALEY.....	Champaign.....	Urbana.
JAMES H. FORRESTER.....	Christian.....	Taylorville.
EVERETT CONNELLY.....	Clark.....	Marshall.
JOHN R. BONNEY.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
T. N. COFER.....	Coles.....	Charleston.
JOHN W. HOUSTON.....	Cook.....	Chicago.
CHARLES S. CUTTING, Pro. J....	Cook.....	Chicago.
AUSBY L. LOWE.....	Crawford.....	Robinson.
STEPHEN B. RARIDEN.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
FRED C. HILL.....	DeWitt.....	Clinton.
WILLIAM W. REEVES.....	Douglas.....	Tuscola.
MAZZINI SLUSSER.....	DuPage.....	Wheaton.
WALTER S. LAMON.....	Edgar.....	Paris.
ISAAC W. IBBOTSON.....	Edwards.....	Albion.
DAVID L. WRIGHT.....	Effingham.....	Effingham.
BEVERLY W. HENRY.....	Fayette.....	Vandalia.
H. H. KERR.....	Ford.....	Paxton.
JAMES P. MOONEYHAM.....	Franklin.....	Benton.
W. SCOTT EDWARDS.....	Fulton.....	Lewistown.
MARSH WISEHEART.....	Gallatin.....	Shawneetown.
DAVID F. KING.....	Greene.....	Carrollton.
GEORGE W. HUSTON.....	Grundy.....	Morris.
CHAS. B. THOMAS.....	Hamilton.....	McLeansboro.
JOHN W. WILLIAMS.....	Hancock.....	Carthage.
MARCELES L. TYER.....	Hardin.....	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson.....	Oquawka.
THERON H. CHESLEY.....	Henry.....	Cambridge.
FRANK HARRY.....	Iroquois.....	Watseka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
I. D. SHAMHART.....	Jasper.....	Newton.
CONRAD SCHUL.....	Jefferson.....	Mt. Vernon.
CHARLES S. WHITE.....	Jersey.....	Jerseyville.
WILLIAM RIPPIN.....	Jo Daviess.....	Galena.
W. Y. SMITH.....	Johnson.....	Vienna.
M. O. SOUTHWORTH.....	Kane.....	Geneva.
JOHN H. WILLIAMS, Pro. J....	Kane.....	Geneva.
ARTHUR W. DESELM.....	Kankakee.....	Kankakee.
WILLIAM HILL.....	Kendall.....	Yorkville.
J. D. WELSH.....	Knox.....	Galesburg.

JUDGES.	COUNTIES.	COUNTY SEATS.
DEWITT L. JONES.....	Lake.....	Waukegan.
WILLIAM H. HINEBAUGH.....	LaSalle.....	Ottawa.
ALBERT T. LARDIN, Pro. J.....	LaSalle.....	Ottawa.
JASPER D. MADDING.....	Lawrence.....	Lawrenceville.
ROBERT H. SCOTT.....	Lee.....	Dixon.
CHARLES F. H. CARITHERS.....	Livingston.....	Pontiac.
DONALD MCCORMICK.....	Logan.....	Lincoln.
ORPHEUS W. SMITH.....	Macon.....	Decatur.
JOHN B. VAUGHN.....	Macoupin.....	Carlinville.
JOHN E. HILLSKOTTER.....	Madison.....	Edwardsville.
CHAS. H. HOLT.....	Marion.....	Salem.
DANIEL H. GREGG.....	Marshall.....	Lacon.
JAMES A. MCCOMAS.....	Mason.....	Havana.
LANNES P. OAKES.....	Massac.....	Metropolis.
WILLIAM J. FRANKLIN.....	McDonough.....	Macomb.
ORSON A. GILLMORE.....	McHenry.....	Woodstock.
ROLLAND A. RUSSELL.....	McLean.....	Bloomington.
GEORGE B. WATKINS.....	Menard.....	Petersburg.
WILLIAM T. CHURCH.....	Mercer.....	Aledo.
ALBERT C. BOLLINGER.....	Monroe.....	Waterloo.
M. J. McMURRAY.....	Montgomery.....	Hillsboro.
CHARLES A. BARNES.....	Morgan.....	Jacksonville.
E. D. HUTCHINSON.....	Moultrie.....	Sullivan.
FRANK E. REED.....	Ogle.....	Oregon.
WILBERT I. SLEMMONS.....	Peoria.....	Peoria.
MARK M. BASSETT, Pro. J.....	Peoria.....	Peoria.
R. W. S. WHEATLEY.....	Perry.....	Pinckneyville.
F. M. SHONKWILER.....	Piatt.....	Monticello.
B. T. BRADBURN.....	Pike.....	Pittsfield.
WILLIAM A. WHITESIDE.....	Pope.....	Golconda.
JOHN D. BRISTOW.....	Pulaski.....	Mound City.
HENRY C. MILLS.....	Putnam.....	Hennepin.
S. LOVEJOY TAYLOR.....	Randolph.....	Chester.
JOHN A. MACNEIL.....	Richland.....	Olney.
ELWIN E. PARMENTER.....	Rock Island.....	Rock Island.
JOHN L. THOMPSON.....	Saline.....	Harrisburg.
GEORGE W. MURRAY.....	Sangamon.....	Springfield.
CLARENCE A. JONES, Pro. J.....	Sangamon.....	Springfield.
H. V. TEEL.....	Schuyler.....	Rushville.
JAMES CALLANS.....	Scott.....	Winchester.
THOMAS H. RIGHTER.....	Shelby.....	Shelbyville.
BRADFORD F. THOMPSON.....	Stark.....	Toulon.
JOHN B. HAY.....	St. Clair.....	Belleville.
FRANK PERRIN, Pro. J.....	St. Clair.....	Belleville.
ANTHONY J. CLARITY.....	Stephenson.....	Freeport.
JESSE BLACK, JR.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union.....	Jonesboro.
FRED DRAPER.....	Vermilion.....	Danville.
SILAS Z. LANDES.....	Wabash.....	Mt. Carmel.
T. G. PEACOCK.....	Warren.....	Monmouth.
LEWIS BERNREUTER.....	Washington.....	Nashville.
JOHN R. HOLT.....	Wayne.....	Fairfield.
JOHN N. WILSON.....	White.....	Carmi.
HENRY C. WARD.....	Whiteside.....	Morrison.
DWIGHT C. HAVEN.....	Will.....	Joliet.
JOHN B. FITHIAN, Pro. J.....	Will.....	Joliet.
W. F. SLATER.....	Williamson.....	Marion.
RUFUS C. BAILEY.....	Winnebago.....	Rockford.
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CASES
DETERMINED IN THE
THIRD DISTRICT
OF THE
APPELLATE COURT OF ILLINOIS,
DURING THE YEAR 1905.

R. W. Coates v. W. R. Hill.

1. *COSTS—when taxation of storage charges justified.* Where the sheriff has levied a distress warrant upon corn, it is proper to tax as costs a charge for the necessary storage thereof during the disposition of the case.

2. *COSTS—what does not preclude moving for taxation of.* Where a party against whom a distress for rent has issued, gives a forthcoming bond and receives back the property levied upon, he may pay the storage charges thereon and subsequently apply for the taxation thereof in his favor if successful in the cause; of necessity, in such case, the propriety of the charge is open to consideration by the court.

Distress for rent. Appeal from the County Court of Piatt County; the Hon. F. M. SHONKWILER, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

REED, EDIE & REED, for appellant.

SENTEL & WHITFIELD, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Appellant levied a distress warrant upon a quantity of corn raised upon his premises occupied by appellee as a tenant, and stored the same in cribs belonging to Bartlett, Kuhn & Co., grain buyers at Chippis Station. Before final judgment in the distress proceedings, appellee gave a forthcoming bond, provided for by statute, and demanded

possession of the corn, but the owners of the cribs refused to surrender such possession unless appellee paid the sum of \$162, claimed to be due for storage charges thereon. Subsequently, upon the dismissal of the distress proceedings by appellant at his costs, appellee filed a motion to have the storage charges paid by him, taxed as costs in the case against appellant. Without objection, the court determined the question involved upon the consideration of affidavits filed on behalf of the respective parties, and ordered the storage charges so paid by appellee, to be taxed as costs against appellant.

It is not claimed by appellant that he did not procure storage for the corn levied upon, but it is insisted, that in the absence of a statute, fixing the amount of storage charges in such cases, and authorizing the same to be taxed as costs, the court was without authority to order the same to be so taxed; that the proof did not justify the court in finding that \$162 was a proper charge for storage; that by the terms of the agreement entered into between appellant and the authorized agent of Bartlett, Kuhn & Co., no storage was to be charged if the corn was sold to said firm, as it subsequently was; and that the payment by appellee of the storage charges claimed to have been contracted for by appellant, was a voluntary payment.

Costs are purely matters of statutory regulation and may not be adjudged against a party upon merely equitable or moral grounds. The procedure in distress for rent is analogous to that in attachment, and by express provision of the statute (sec. 20, chap. 80), is governed in part by the provisions of the Attachment Act. Section 19 of Chapter 53 relating to fees of sheriffs, provides: "For taking possession of or removing property levied on, the officer shall be allowed to tax the actual costs of such possession or removal." It was held in *Olds v. Loomis*, 10 Ill. App. 498, and we think properly, that the necessary actual costs of taking possession of, removing and keeping property taken on a writ of attachment, are to be primarily determined by the court.

The distress warrant in this case was levied by the

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sheriff, and the corn, in contemplation of law, was thereafter in his custody abiding the final determination of the suit, or such order as the court might make in the premises with reference to its prior disposition, and a charge for the necessary storage of the corn during such time was a proper item to be taxed as costs in the case. While the arrangement under which the corn was stored in the cribs of Bartlett, Kuhn & Co., was entered into between their agent and appellant, the latter was acting in that behalf for the sheriff, as its custodian.

Appellee upon tendering a proper forthcoming bond was entitled to have the corn released from the levy and take it into his possession. He might have refused to pay the storage charges demanded by the agent of Bartlett, Kuhn & Co., and applied to the court for an order directing the sheriff to deliver the corn to him, upon payment of the necessary and proper storage charges, then to be ascertained and fixed by the court, in which case the amount so ascertained and fixed by the court would be proper taxable costs in the case. Appellee in paying the amount demanded for storage charges, without first obtaining such order of the court, took the chances of having the amount so paid subsequently approved by the court as a necessary and proper charge, but we do not think such payment by him should be held to be voluntary, in the sense that it precluded him from moving the court to ascertain and fix the proper amount and tax the same as costs in the case.

If the procedure here adopted could be said to be irregular, the record does not show it was objected to by appellant, but rather that it was acquiesced in by him and that the only question submitted to the court for determination was the propriety of the amount sought to be taxed as costs. This was purely a question of fact, upon which the evidence pro and con was close and conflicting, and we are not disposed to say that the court erred in its findings that the contract for storage of the corn was as contended for by appellee and that \$162 was a proper amount to be taxed as costs. The judgment is affirmed.

Affirmed.

**J. F. Hoover, et al. v. Thomas L. Holland, et al.,
Executors.**

1. JUDGMENT BY CONFESSION—*power and duty of court with respect to opening.* Courts of law exercise an equitable jurisdiction over judgments entered by confession under a power of attorney or cognovit, and such equitable jurisdiction should be exercised liberally.

2. JUDGMENT BY CONFESSION—*when, should be opened.* Where it appears that the note upon which the judgment was entered was old and had payments indorsed thereon made after the statute had run against it, coupled with a delay of ten years after the death of the payee in entering judgment, the court should open up the judgment.

Judgment by confession. Error to the County Court of Tazewell County; the Hon. GEORGE C. RIDER, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

WILLIAM A. POTTS, for plaintiffs in error.

A. R. RICH, for defendants in error.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

On July 14, 1899, judgment by confession was entered in vacation, in the County Court of Tazewell County, in favor of defendants in error and against plaintiffs in error for \$156.96 and costs, upon two notes and cognovits, one for the sum of \$50 bearing date March 18, 1875, payable sixty days thereafter with interest at ten per cent. per annum, and one for the sum of \$20 bearing date of November 22, 1875, payable thirty days thereafter, with interest at ten per cent. per annum. Each of said notes bore indorsements, as follows: "Received on the within note five dollars June, 1886. Received on the within as interest \$5 this July 16th, 1889." Lawson Holland, the payee in said notes, died July 27, 1889.

At the first law term of the County Court after plaintiffs in error received actual notice of said judgment, they filed their motion to have the same vacated and to be permitted

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to plead to the merits of the action. The court denied the motion, and this writ of error is prosecuted to reverse such ruling.

Courts of law exercise an equitable jurisdiction over judgments entered by confession under a power of attorney or cognovit, and such equitable jurisdiction should be exercised liberally. *Condon v. Besse*, 86 Ill. 159; *Wyman v. Yeomans*, 84 Ill. 403.

The facts disclosed by the affidavit of George Holland, who appears to be a competent witness, together with such as appear upon the face of the record—the antiquity of the notes, the indorsements thereon of payments, purporting to have been made after the statute had run as a bar, and the delay of ten years after the death of the payee, in entering up the judgment—should have appealed irresistibly to the court to grant the motion and allow appellants to plead and make their defense upon the merits.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Chester M. Lane v. City of Springfield.

1. *GAMBLING—when particular offenses are separate and distinct.* The offense defined by one ordinance of keeping and maintaining a gambling house and an offense defined by another ordinance of being an inmate of such a house, are separate and distinct and may authorize the imposition of separate penalties in the same action where both have been violated by the same person.

2. *GAMBLING ORDINANCE—when valid.* An ordinance fixing a penalty for being an inmate of a gambling house is valid as an exercise of the police power.

3. *PENALTIES—when improper to cumulate.* Where a gambling house, has been illegally set up, and after set up, continuously maintained, it is improper to cumulate penalties on account thereof.

4. *EVIDENCE—when competency of, not open to review.* Where evidence was received without objection, no question as to its competency can be raised on appeal.

5. *DISMISSAL—when action of court in refusing to order, not subject to review.* Where the bill of exceptions does not show any motion for

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a dismissal, nor any ruling thereon, the alleged action of the court in refusing to dismiss is not subject to review.

6. *REMITTITUR*—*authorized in prosecution for ordinance penalties.* In a prosecution under a gambling ordinance a remittitur was authorized and an affirmance entered upon its making.

Action of debt to recover penalties. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1904. Affirmed upon remittitur. Opinion filed April 20, 1905. Remittitur filed and judgment affirmed, May 11, 1905.

CONNOLLY & BARNES, for appellant; DAVIS McKEOWN, of counsel.

ARTHUR M. FITZGERALD, for appellee; WILLIAM L. PATTON, of counsel.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

This is an action in debt by appellee against appellant to recover penalties for a violation of two ordinances of the City of Springfield, as follows:

"651. Gambling House or Rooms. Whoever shall, within the City of Springfield, set up, keep, maintain or support any gambling house or room, or place used for the practice of gambling or playing for money or property, or shall knowingly permit any building or premises owned or controlled by him to be used for any such purpose; or whoever shall keep or use, or permit to be used, in any building or place occupied, controlled or owned, by such person, any keno or faro table, wheel of fortune, roulette, shuffle board, cards, or other instrument or device commonly used for the purpose of gaming, shall, upon conviction, be fined not less than twenty-five dollars nor more than two hundred dollars for each offense."

"652. Inmates of Gaming House. Whoever shall be an inmate of any gaming house or room, within said city, or shall be in any way connected therewith, or shall frequent or visit the same or be found therein; or whoever shall, within the city, play for any money or other valuable thing at any game with cards, dice, billiards, or any other instrument or device whatsoever; or whoever shall bet on any such game when played by others, shall, on conviction, be fined not less than ten dollars nor more than one hundred dollars for each offense."

The declaration contains twenty counts, the first ten counts alleging violations of ordinance 651 upon ten certain days in September, 1903, and the last ten counts alleging violations of ordinance 652 upon the same days.

Upon trial by a jury, there was a verdict against appellant upon the first ten counts and upon the last eight counts and the penalty, or debt, was fixed at \$100 upon each count, making a total of \$1,800. Upon this verdict the court rendered judgment, after overruling appellant's motion for a new trial.

It is urged that the offense under ordinance 651 is of a higher degree than the offense under ordinance 652, and therefore, that a person found guilty of violating ordinance 651 cannot, at the same time, be found guilty of violating ordinance 652; that a violation of the latter ordinance is necessarily merged in the violation of the former, and but one penalty can be imposed. Ordinance 651 was enacted to prohibit the establishment, the keeping or maintaining, of a gambling house or room, and was directed particularly at the proprietor of such a house or room, while ordinance 652 was enacted to prohibit persons from frequenting or being inmates of a place so established, kept or maintained. It is clear that the offenses sought to be prohibited and penalized are separate and distinct. A person may be guilty of violating the provisions of ordinance 651 by setting up, keeping or maintaining a gambling house or room, as proprietor, and yet not be present in such house or room, as an inmate or frequenter, so as to be amenable to the penalty imposed by ordinance 652, and the same person may be amenable to the penalty imposed by ordinance 651 as being a proprietor and to the penalty imposed by ordinance 652, as being an inmate or frequenter.

It is also insisted by appellant that the evidence did not authorize the jury to cumulate the penalty imposed by ordinance 651, because if appellant violated said ordinance, such violation was continuous from September 3, 1903, to September 21, 1903. The evidence tended to prove that appellant kept and maintained a gambling house at 415½

E. Washington street in the city of Springfield, and at no other place, and that there was no interruption in the conduct of such establishment as a gambling house, during the time indicated. It was, so far as the evidence shows, one act of setting up, keeping and maintaining, and the jury were not justified in imposing upon appellant more than one penalty. *Cawein v. Commonwealth* (Ky.), 61 S. W. Rep. 275; *Dixon v. Washington*, 4 Cranch, 114; *Freeman v. State*, 119 Ind. 501. If there was an interruption in the conduct of such establishment as a gambling house, a cessation in its operation and a re-opening, it was incumbent upon appellee to show it. In this case no presumption can be indulged to supply a want of the necessary proof. Furthermore the language of the ordinance: "Whoever shall, * * * set up, keep, maintain or support" implies continuity.

It is urged that the testimony of the witness Hankins, as to what appellant did and said at the place in question upon a former occasion, merely tended to show that he was then keeping a gambling house, and was incompetent as tending to show that appellant was keeping a gambling house at the time charged in the declaration. No objection having been made by appellant to the testimony of the witness, the trial court was not called upon to pass upon its competency, and the question is not before us for decision.

A common gambling house is a nuisance by the common law and the keeping of a common gaming house is made a misdemeanor by statute. It is the duty of the municipality to enforce its ordinances enacted to prohibit gaming and the keeping of gaming houses. The insidious character of the evil, and the utter lawlessness and abandon that characterizes those engaged in it as a profession, demands a resort to drastic measures for the suppression of gaming and the punishment of those who allure their victims to disgrace and ruin. For the attainment of these ends, ordinance 652 is not an unreasonable exercise of the police power. The verdict of the jury finding that appellant was an inmate of

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the gaming house in question—a frequenter of the place—upon the several occasions testified to by the witnesses Harts, Fitzgerald and Lawler, is supported by the evidence and should stand.

Appellant offered in evidence a resolution, adopted by the city council of the city of Springfield, as follows:

“Ordered, by the City Council of the City of Springfield:

“That the City Attorney is hereby instructed to discontinue action in cases brought in the name of the City in the Circuit Court for violation of ordinances for the following reasons:

“First, he was not instructed by this council, nor any officer of the city so to do, for the reason that the Grand Jury was in session at the time the præcipes in those cases were filed, and true bills were found. If for any reason he shall refuse, the Mayor is hereby instructed to order the Corporation Counsel to dismiss said cases for the City.

“Passed by the City Council of the City of Springfield, Illinois, November 2, 1903. (Seal) C. F. Morrow, City Clerk.”

It is represented by counsel for appellant, that the city attorney having refused to obey this extraordinary mandate of the city council, the corporation counsel, in pursuance of an order from the mayor, moved the court to dismiss the suit, and that such motion was denied by the court. Error is assigned upon the alleged ruling of the court in denying such alleged motion. The bill of exceptions fails to show any such motion or the ruling of the court thereon and we are therefore precluded from passing upon such alleged error. *St. L. & O. F. Ry. Co. v. Union Bank*, 209 Ill. 457.

Error is assigned upon the action of the court in giving, refusing and modifying certain instructions, but in view of what has been heretofore said, it is unnecessary to discuss such assignments of error in detail.

Having held, that under the evidence in this case, cumulative penalties were improperly imposed upon appellant, for keeping a gaming house or room, it follows that the verdict of the jury and the judgment of the court thereon imposing more than one penalty for a violation of ordi-

nance 651 was erroneous. A penalty of \$100 for a violation of that ordinance under one count of the declaration and penalties amounting to \$800, being \$100 under each of eight counts, charging violations of ordinances 652, were properly imposed, and as to these the judgment may be affirmed. If, within thirty days after the filing of this opinion, appellee will remit \$900 from the judgment, the same will be affirmed for \$900, otherwise the judgment will be reversed and the cause remanded.

Affirmed upon remittitur.

Remittitur filed and judgment affirmed May 11, 1905.

John A. Schulte v. Meredith Warren, et al.

1. RIPARIAN OWNERSHIP—*when attaches*. In this State the owner of land bounded by the margin of a stream, whether navigable or non-navigable, takes to the middle thread of the stream.

2. HUNT AND FISH—*right of public to*. The right of the public to hunt and kill wild fowl and to take fish, at least with hook and line, extends as an incident to the right of navigation to all streams and lakes navigable in fact, notwithstanding the ownership of the soil underlying such streams and lakes is in private individuals.

GEST, J., dissenting.

Injunction proceeding. Appeal from the Circuit Court of Mason County; the Hon. THOMAS N. MEHAN, Judge, presiding. Heard in this court at the May term, 1904. Affirmed. Opinion filed April 20, 1905.

BEACH, HODNETT & TRAPP and LYMAN LACEY, JR., for appellant.

W. A. POTTS and JESSE BLACK, JR., for appellees.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Appellant filed his bill in equity in the Circuit Court of Mason County to enjoin appellees from entering upon certain lands therein described and from hunting on said lands. A temporary injunction was granted, but upon final hear-

ing, the same was dissolved, and a decree entered dismissing the bill for want of equity.

The bill alleges that appellant is the owner in fee simple of certain swamp and overflowed lands located in sections 19, 20, 29 and 30 in township 23, range 7, and sections 24, 25, 26, 35 and 36 in township 23, range 8, in Mason county, Illinois, bounded in part, on the west by the Illinois river and on the north by the north line of Mason county; that the lands are subject to overflow from the Illinois river in times of high water, and as surveyed in fractional subdivisions, completely surrounded a meandered body of water called Clear Lake and its southerly branch or arm, some times called Mud Lake; that prior to the placing of certain dams and locks in the Illinois river and the construction of the Chicago Sanitary Ditch, the said lands were valuable as pasture during the late summer and early fall; that the placing of said dams and locks and the construction of said ditch has resulted in permanently raising the water level on said lands to such a height that they are no longer valuable as pasture or for farming; that the only practical value of the land to appellant, in its present overflowed condition, is the exclusive right of hunting thereon the large quantities of wild fowl, and especially wild ducks, that frequent said lands in the spring and fall of the year; that for the purpose of availing himself of the exclusive right to hunt upon said premises, appellant caused notices to be conspicuously posted in numerous places on said lands, notifying the public to refrain from hunting thereon; that each of the appellees was personally notified that appellant was the owner of said lands and was requested to refrain from hunting thereon; that the appellees without the consent of appellant went upon said lands on various days and at various times in November, 1901, and in March and April, 1902, and on other days before and after those dates, with boat and gun and decoys and hunted and shot ducks and other wild fowl thereon; that appellees had been and were acting in concert and combining and confederating together, to deprive appellant of his exclusive right to hunt

on said lands and were threatening to continue so to do that appellees and each of them are wholly insolvent and execution proof. The appellees answered the bill, denying all of its allegations, except they admitted that said lands were swamp and overflowed lands, situated in the Illinois river bottom; that they were subject to overflow; that locks and dams were placed in the Illinois river, and that a canal had been cut from Chicago. Alleged that appellant has no exclusive right to exclude the public from navigation and hunting and fishing; that the lands are situated in a low, deep basin, underlying or bordering upon a certain body of water or lake, known as Clear Lake, Mud Lake and Clear Lake Slough; that said body of water opens into the Illinois river directly and indirectly, was, in a state of nature, and now is, and has been for a long space of time, to wit, more than twenty years last past, navigable water used by the public as a highway for commercial navigation, and used by the public and by appellees for fishing and hunting; that the public and the appellees have rights of navigation and hunting and fishing in said navigable waters; that appellant can have no monopoly or exclusive control of said navigable waters on said lands for such purposes; that said lands underlie the body of water known as Clear Lake, Mud Lake and Clear Lake Slough; that said body of water is a lake and was meandered in the original government survey of lands bordering thereon; is of sufficient depth and size to enable boats and barges conveying timber, grain and lumber and other articles of commerce over and upon said body of water, to be run and used thereon, and to accommodate navigation of said body of water for commercial purposes and for pleasure; that such body of water is now and was in a state of nature, and for the space of twenty years and upward last past, had been navigable in fact, and used as a highway for boats in commercial navigation in conveying lumber, wood, grain and other products from the lands surrounding said body of water, through said body of water to the Illinois river; that said body of water was in a state of nature, then was, and for more than twenty years had been

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used by the public in hunting thereon and in taking fish therefrom; that appellant had no exclusive right of hunting upon said land underlying said body of water, and could not acquire and enjoy such rights to the exclusion of the public, or of the appellees, or any other person, and in attempting so to do, violated the law and the rights of the people of the State. To this answer appellant filed his replication and the cause was thereupon referred to the master to take and report proofs.

At the hearing it was stipulated by appellees that appellant had the record title to the lands described in the bill, except that part of the said lands, if any, included in the boundary of Clear Lake as originally bounded and meandered.

It is established by the evidence that the lands in question are swamp and overflowed lands; that since appellant has owned the same he has paid the taxes thereon and been in the possession and control thereof; that prior to 1901, the lands generally overflowed in the spring and occasionally in the fall of the year, and during high freshets they would be flooded to a depth of from six to twelve feet; that when not flooded, the lands were available for pasture and about twenty acres fit for cultivation; that of the 2,800 acres involved, 1,200 or 1,300 acres was timber and the remainder in willow, buckbrush and open places; that Clear Lake, a body of water, connected at its southerly end with the Illinois river, extended within the lands in question, in two branches or arms, one in a northerly and one in a westerly direction, fractional portions of sections 19, 20, 25, 29 and 30, designated in the record as the "middle ground," lying between the two branches or arms; that in the government survey of the lands involved, they were meandered on both arms of Clear Lake; that in consequence of the construction, by the United States Government about 1890, of a lock and dam in the Illinois river at LaGrange about sixty-five miles below the lands in question, the water level in the Illinois river above said dam and in said Clear Lake was raised about eighteen inches; that owing to the con-

struction of the Chicago Sanitary Ditch in 1901, and the consequent flow of water from Lake Michigan into the Illinois river, the water level in said river was raised about three feet six inches; that since said last named date the lands in question including the portion designated the "middle ground," have been overflowed to a depth of from four to six feet, and that such condition of overflow is permanent; that in seasons of high water, usually in the spring of the year, prior to the construction of the lock and dam and the ditch above mentioned, barges, boats and steam tugs navigated the waters overlying the land in question, for commercial purposes, and loaded freightage of grain at Haven's and Elm landings, located upon said lands or lands adjacent thereto, and that the permanent stage of water overlying said lands since 1901, is sufficient to afford such navigation at all seasons of the year when the water is open for navigation. It is further established by the evidence that the appellees notwithstanding notices posted by appellant in conspicuous places, prohibiting trespassing thereon and personal notice to each of them to desist from so doing, have, by means of boats gone upon the water overlying the lands in question, for the purpose of hunting under claim of right in themselves and the public generally, so to do, and that they proposed to continue to go upon said water for such purpose.

It is urged on behalf of appellant that his title to the lands involved extends to ordinary low water mark in Clear Lake, and that such title was not divested by the permanent submergence of said lands caused by the construction of the dam in the Illinois river at LaGrange and the sanitary ditch from Lake Michigan to the said river; that as the owner of the soil underlying such waters appellant has the exclusive right to fish and hunt thereon, and that the right of the public therein is limited to an easement for the purposes of navigation. On the other hand, it is insisted on behalf of appellees that appellant's title to the lands involved extended only to the water's edge, as it ordinarily stands in Clear Lake, free from disturbing causes; that the

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submergence of the lands above referred to, being permanent in its character, the present water's edge must be regarded as the boundary of appellant's lands; that to the extent that appellant's lands are permanently submerged he has been divested of his title thereto or such title is thereby suspended; that the waters overlying said lands being navigable in fact, appellant has no exclusive right of hunting or fishing therein, but that those rights are in the public, incident to the public right of navigation.

While the right to hunt upon the waters overlying the lands described, is the only right directly involved under the pleadings in this case, counsel upon both sides have considered such right as analogous with the right to fish, and have argued the case upon the theory that the determination of the right to fish, was decisive of the right to hunt. Notwithstanding appellant predicates his exclusive right to hunt upon and fish in, the waters in question, upon his ownership of the soil underlying such waters, we do not consider a determination of such ownership of the soil, as necessary to the decision of this case. It may be admitted in the view we are disposed to take of the question that appellant's title to the lands described extended to the water's edge in Clear Lake, as the same ordinarily stood when free from disturbing causes; that the dam and sanitary ditch heretofore mentioned as causing the submergence of said lands, are to be regarded as disturbing causes, not affecting the boundary of said lands and that appellant has title to the lands underlying the waters in question.

Notwithstanding counsel in this case have furnished us with most able and exhaustive briefs, our attention has not been directed to any reported case in this State, passing directly upon the question here involved, and we assume no such case exists.

By the common law, arms of the sea and streams where the tide ebbed and flowed are only deemed navigable, and streams above tide water, although navigable in fact, are not deemed navigable in law. Following this common law doctrine it has been uniformly held in this State, although

there are no tide-waters within its boundaries, that the owner of land bounded by the margin of a stream, whether navigable or non-navigable, took to the middle thread of the stream. *Middleton v. Pritchard*, 3 Scam. 510; *Albany Bridge Co. v. The People*, 197 Ill. 199.

By the common law, also, the right to take fish belongs essentially to the owner of the soil in streams or bodies of water, where the tide did not ebb and flow, and therefore not navigable in law. *Beckman v. Kreamer*, 43 Ill. 447.

In those States of the Union in which there are no tide-waters the common law test of navigability does not prevail, and those waters are deemed navigable which are navigable in fact. In this State the title to all lakes and like bodies of water, large or small, navigable or non-navigable, which are meandered in the original survey, has been declared to be in the State, in trust for all its citizens. *Fuller v. Shedd*, 161 Ill. 462. While this doctrine was announced as being the true common law doctrine upon the subject, it may be more properly termed a modification of the common law doctrine made necessary by the existence of large lakes and ponds not provided for or contemplated by the common law and to which the common law was inapplicable by the established usages of the State and because it was better suited to the condition of our people.

In *Cummings v. The People*, 211 Ill. 392, it is said: "The title to wild game is in the State, without reference to the ownership of the lands upon which it is found," and we perceive no reason why the same doctrine of State ownership is not applicable to the fish in the waters overlying appellant's lands. These waters have now a continuously permanent connection with the waters of the Illinois river, and Clear Lake, and when within the last named body of water it is undeniable that the fish are subject to be taken by the public.

At common law the public right to fish extends to all navigable waters and the test of such navigability is the ebb and flow of the tide. This test having been discarded as inapplicable here, and navigability in fact substituted

therefor, no reason exists why the right of the public to hunt and kill wild fowl, and to take fish, at least with hook and line, should not, as an incident to the right of navigation as at common law, extend to all streams and lakes navigable in fact, where the ownership of the soil underlying such streams and lakes is in a private individual. While the title to soil underlying streams, and bodies of water not meandered in the original survey, has been judicially declared to be in the riparian owner and such declaration is a property rule in this State, the owner of the soil underlying a stream or body of water navigable in fact has no title to the water or to the fish therein or the wild fowl thereon.

It may be asserted without fear of successful contradiction that "from a time whence the memory of man runneth not to the contrary," the people of this State have assumed to have, and in fact have enjoyed, the right to kill wild fowl, and to fish with hook and line in and upon all waters navigable in fact, within the jurisdiction of the State, without any regard to private ownership of the soil underlying such waters.

The waters in question, being navigable in fact, appellees and the public have the unquestioned right to pass over them in boats, and as incident to that right, no reason is perceived why they may not take fish from such waters with hook and line and hunt for and kill wild fowl thereon or in the air above. The exercise of such rights, so long enjoyed by the public, as incident to the right of navigation, interferes with no property right of the owner of the soil underlying such waters, contravenes no rule of public policy but rather is most in accord with the policy of the State to afford to all its citizens equal facilities in the enjoyment of property common to all.

In *Lincoln v. Davis*, 53 Mich. 375, it is said by Mr. Justice Campbell: "Such fishing as is done with lines from boats even in narrow streams cannot be complained of by riparian owners. The fish are like any other animal *feræ naturæ*, and in this region have always been regarded as

open to capture by those who have a right to be where they are captured." In *Willow River Club v. Wade*, 100 Wis. 86, the court in discussing the public right of fishery as an incident of the public right of navigation, said: "The question recurs whether the public right of fishing is included in or an incident of, such public right of navigation. In other words, has the plaintiff as riparian owner, the exclusive right to take fish from the river? The plaintiff certainly has no property in the particles of water flowing in the stream, no more than it has in the air that floats over its land. Its rights in that respect are confined to their use and to preserving their purity while passing. So, the fish in the stream were not the property of the plaintiff at common law, any more than the birds that flew over its land. As indicated, the public right of fishery in tidal rivers was maintained, at common law, in England before the use of steam, when vessels could only be carried up the river by the flow of the sea, and down the river by the ebb of the sea, and consequently when the ebb and flow of the tide practically measured the navigability of the stream. For the same reason, the public should have the right to fish in all the public navigable waters of the State, including all public navigable rivers and streams of the State."

It is earnestly insisted by counsel for appellant that the Supreme Court of this State has by absolutely necessary inference settled the question here involved in favor of their contention that the owner of the soil has the exclusive right to hunt and fish in waters navigable in fact overlying such soil. While, as we have heretofore said, this precise question has not, so far as we are advised, been before the court for determination, it must be conceded that expressions by way of argument are to be found in the opinions of the court, strongly tending to support the view urged by counsel for appellant. It will be observed, however, that in all of these cases the court was dealing with the property rights only of a riparian owner and that the expressions so used were not necessary to the decision of

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the questions directly involved. In *Mayer v. Erhardt*, 88 Ill. 452, the court, quoting with approval, say: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Middleton v. Pritchard, *supra*, was an action in trespass for cutting and carrying away timber belonging to a riparian proprietor. The court in stating the common-law doctrine with reference to streams above tide-water, although navigable in fact, say: "The water and the soil under it, to the center of the current, as well as the right to fish there, are exclusive in the riparian proprietor." In *Beckman v. Kremer*, 43 Ill. 447, the riparian proprietor brought trespass to recover damages for fish taken with seines in a so-called, "small lake." It does not appear whether the body of water involved was meandered in the original survey; whether it was navigable in fact; whether it was a lake proper or merely the widening of a stream emptying into the Kankakee river. Referring to the exclusive right of the riparian proprietor at common law to take fish in a non-navigable stream, the court said: "By the common law, a right to take fish belongs so essentially to the right of soil, in streams or bodies of water, where the tide does not ebb and flow, that if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to wit, to the thread of the stream, where he owns upon one side only. Within these limits, by the common law, his right

of fishery is sole and exclusive, unless restricted by some local law or well-established usage of the State where the premises may be situate."

Braxton v. Bressler, 64 Ill. 488, was an action in replevin by a riparian owner, for rock taken from the bed of a navigable stream, and the court said: "Where the river is navigable, the public have an easement, or a right of passage, upon it as a highway, but not the right to remove the rock, gravel or soil, except as necessary to the enjoyment of the easement. No individual can appropriate to his own use the bed of the stream, without the consent of the adjoining proprietor."

Washington Ice Co. v. Shortall, 101 Ill. 46, was an action of trespass by the riparian owner, for cutting and appropriating ice formed over the bed of the Calumet river, a stream navigable in fact. The court said: "When water has congealed and become attached to the soil, why should it not, like any other accession, be considered part of the realty? Wherein, in this regard, should the addition of ice formed over the bed of a stream be viewed differently from alluvion, which is the addition made to land by the washing of the sea or rivers. And we do not perceive why there is not as much reason to allow the riparian owner the same right to take ice as to take fish, which latter is an exclusive right in such owner." In McFarlin v. Essex Co., 10 Cush. 309, Shaw, Ch. Jr., remarked: "It is now perfectly well established as the law of the commonwealth, that in all waters not navigable in the common-law sense of the term, that is, in all waters above the flow of the tide, the right of fishery is in the owner of the soil upon which it is carried on, and in such rivers that the right of soil is in the owner of the land bounded upon it. If the same person owns the land on both sides, the property in the soil is wholly in him, subject to certain duties to the public; and if different persons own the land on opposite sides, each is proprietor of the soil under the water to the middle or thread of the river." "The riparian proprietor has the sole right, unless he has granted it, to fish with *nets* or

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seines in connection with his own land. Angell on Water Courses, sec. 67." "In *Adams v. Pease*, 2 Conn. 481, it was held that the owners of land adjoining the Connecticut river above the flowing and ebbing of the tide, have an exclusive right of fishery opposite to their land, to the middle of the river; and that the public have an easement in the river as a highway, for passing and repassing with every kind of water craft. So too, seaweed thrown upon the shore belongs to the owner of the soil upon which it is cast. *Emans v. Turnbull*, 2 Johns. 313." "The exclusive right in the owner to take ice formed over his land, is an analogous right to those other ones which are acknowledged to exist in the subjects which have been mentioned, and may with like propriety be recognized."

The *People v. Bridges*, 142 Ill. 30, was a prosecution for a violation of the provisions of an act entitled, "An Act to encourage the propagation and cultivation and to secure the protection of fish," etc. for seining in private non-navigable waters, with a seine, the meshes of which were of less size than was required by statute. The court cited with apparent approval that portion of the opinion in *Beckman v. Kreamer*, *supra*, heretofore quoted, and then added: "It may be observed that, under this definition, the fishery right of the land owner in the case before us, is no more exclusive than is that of a riparian proprietor on one or both sides of a stream above tide-water, and both are equally subject to such rules as may be imposed by law or usage upon its exercise."

It is urged that having adopted by statute, the common law of England, the court is bound to follow the same as it there prevailed giving to the riparian proprietor the exclusive right to fish in waters above the ebb and flow of the tide. The common law of England has been adopted in this State "so far as the same is applicable and of a general nature" (*Hurd's Stat.*, 1903, chap. 28, sec. 1, p. 435), but as was said in *Boyer v. Sweet*, 3 Scam. 120, "this must be understood only in those cases where the law is applicable to the habits and conditions of our society, and is in har-

mony with the genius, spirit and objects of our institutions." In this State the court has not hesitated to declare the common law rules that the ebb and flow of the tide was the only test of navigability, and that the title to the beds of all lakes and ponds above tide-water was in the riparian proprietor, as inapplicable and not suited to the condition of our people. If contrary to the rule of the common law, the State has title to all the lakes and ponds, navigable or non-navigable, within its boundaries, which were meandered in the original survey, in trust for the use of all the people for purposes of hunting, fishing, boating and the like, we do not perceive upon what ground the people may be excluded from the enjoyment of like privileges in any and all waters navigable in fact. The streams and bodies of water, navigable in fact, within the boundaries of the State are the very places to which all the people, having free access for the purposes of navigation, resort for purposes of boating, hunting and fishing, and in and upon such waters is largely expended the public money for the preservation, protection and propagation of fish and the protection of wild water fowl.

In *Fuller v. Shedd*, 161 Ill. 462, it is said: "The policy of the State in recent years has been to stock its waters, both streams and lakes, with fish, as a means of giving cheap and valuable food to her citizens, and with this purpose regular appropriations and expenditures are made. If we depart from the reasonable rule we have established, the small non-navigable lakes would become the private waters of riparian owners, pertinent to their lands, with exclusive rights thereon as to boating, fishing and the like, from which the body of the people would be excluded—a principle inconsistent with and not suited to the condition of our people or called for as a rule of law."

If the rule of the common law applicable to small non-navigable lakes, was properly discarded by the court as "inconsistent with and not suited to the condition of our people or called for as a rule of law," much more reason exists, in our opinion, why such common-law rule should

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not prevail as to larger bodies of water, navigable in fact.

The decree of the Circuit Court dismissing the bill for want of equity was right in our judgment and is affirmed.

Affirmed.

Mr. Justice GERT, dissenting.

Russell, Burdsall & Ward (incorporated) v. Excelsior Stove & Manufacturing Company.

1. *CONTRACT—when abandoned.* A contract is deemed to have been abandoned by a party where his letters indicate a clear purpose not to abide by its terms and likewise a positive and unequivocal refusal to comply therewith.

2. *CONTRACT—what not duty of party to, where the other party has abandoned.* Where one party to a contract has abandoned the same, it is not essential that the other, in order to recover for a breach, continue to perform useless acts with a view to keeping it alive.

3. *CONTRACT—when party in default cannot maintain action for breach of.* Where a vendee has accepted goods delivered under an express contract, but not at the time or in the quantity required of it with knowledge of the default of the vendor in these respects, and he has himself failed, without showing legal excuse, to pay for them according to the contract, or a readiness and willingness so to do, he cannot maintain an action on the contract for the default of the vendor.

4. *CONTRACT—meaning of "requirements" as used in.* Where a party agrees to purchase his "requirements" he thereby contracts to purchase what he shall need in the regular course of his business and not merely what he may choose to order.

5. *SET-OFF—proof essential to establish.* Under a plea of set-off, it is essential that the defendant shall prove the same facts that he would be required to prove if he had brought an original action upon his demand.

6. *DAMAGES—when, accruing after commencement of action may be recovered.* Where a contract has expired, all damages for its breach accruing up to the time of the trial may be recovered.

7. *SECONDARY EVIDENCE—what is.* Notwithstanding a witness may make a pretense of testifying from an independent recollection, yet where it clearly appears that his evidence was based upon a reading of written instruments, the evidence is secondary and incompetent.

Action of assumpsit. Appeal from the Circuit Court of Adams County; the Hon. HARRY HIGBEE, Judge, presiding. Heard in this

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court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

FASSETT & ANDREWS and M. F. CARROTT, for appellant.

H. M. SWOPE and VANDEVENTER & WOODS, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

This is a suit in assumpsit by appellant against appellee, to recover \$1,014, the price of stove bolts sold and delivered in pursuance of a written contract, embodied in the following:

“QUINCY, ILL., December 14, 1898.

RUSSELL, BURDSALL & WARD, Port Chester, N. Y.

GENTLEMEN: Enter our order for our requirements in stove bolts from date to Jan. 1, 1901, not to exceed ten million bolts at a discount of 80-10-2- $\frac{1}{4}$ for bulk. Delivered f. o. b. cars Quincy, terms 60 days 2 off 10 days. Price guaranteed against decline and quality guaranteed equal to any stove bolt on the market.

Yours truly,

EXCELSIOR STOVE & MFG. CO.,

JOHN J. FISHER, Pres. & Treas.

Accepted, RUSSELL, BURDSALL & WARD,

Per F. A. MANN, Mgr.,

811 N. Y. Life Bldg., Chicago.”

“PORT CHESTER, N. Y., Dec. 14, 1898.

EXCELSIOR STOVE & MANF'G CO., Quincy, Ill.

GENTLEMEN: We are disposed at all times to meet honest competition and will therefore modify your contract under even date so far as price, and make same read 80-10-2- $\frac{1}{4}$ for bulk and 12 $\frac{1}{2}$ per cent. Trusting this will be satisfactory and that you will favor us with your business, we are,

Yours truly,

RUSSELL, BURDSALL & WARD,

Per F. A. MANN, Mgr.”

To the declaration, consisting of the common counts, appellee pleaded the general issue and two special pleas of set-off. The pleas of set-off allege, that on or about September 13, 1899, appellant refused to deliver any more

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stove bolts under the contract; that appellee was thereby compelled to go into the market and purchase stove bolts at an advanced price to supply the requirements of its business, and that by reason of appellant's refusal to deliver the bolts as ordered, appellee was damaged to the amount of \$1,419.46. By agreement, a jury was waived and the case tried by the court. The finding and judgment was in favor of appellee, on its pleas of set-off, for \$403.59.

It was stipulated upon the trial, that on different dates during the year 1899, appellant sold to appellee certain lots or quantities of stove bolts upon orders given by appellee; that said stove bolts were afterwards, at different times, shipped and delivered by appellant to appellee; that payment for each of said shipments of bolts was due sixty days after the respective dates of said shipments, and that the dates upon which said shipments of stove bolts were made to said appellee, and the amounts or money values of the same according to the agreed prices therefor, were, respectively, as follows:

" Nov. 2, 1899.....	\$ 234 54
Nov. 2, 1899.....	85 90
Dec. 9, 1899.....	218 05
Dec. 19, 1899.....	65 20
Jan. 17, 1900.....	106 97
Feb. 23, 1900.....	39 04
March 3, 1900.....	266 30

Total	\$1,014 00."
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No part of this amount was paid by appellee, at the time this suit was instituted.

It does not appear from the record, how soon after the making of the contract appellee ordered bolts shipped in pursuance of its terms, but the evidence shows that beginning March 5, 1899, appellee, at frequent intervals, ordered shipment of bolts and that such orders were received and acknowledged by appellant. That from that time until the last shipment made March 3, 1900, in fulfillment of orders given prior to September 20, 1899, appellee was

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continually urging appellant to fill more promptly the orders theretofore given, and appellant was as continually promising speedy shipment and excusing the delay in shipment because of the unprecedented volume of business and its inability to obtain the raw material for the manufacture of bolts. It is conceded that about six months after the contract went into effect there was a very considerable advance in the price of bolts and that such advance in price continued during the life of the contract. In September and October, 1899, there was correspondence between appellant and appellee, as follows:

"CHICAGO, ILL., Sept. 13, 1899.

THE EXCELSIOR STOVE MFG. CO., Quincy, Ill.

GENTLEMEN: For the first six months on your contract this year you ordered 159,000 stove bolts. In August you ordered 400,000, and I see that already in September you have ordered 535,000 more.

This looks very much as though you were stocking up for a long future business at our expense, and as it is near the end of your business year, you certainly cannot use them during the life of our contract.

We would like to receive an explanation from you.

Respectfully yours,

RUSSELL, BURDSALL & WARD,
F. A. MANN, Mgr."

"SEPT. 14, 1899.

MR. F. A. MANN,

811 N. Y. Life Bldg., Chicago, Ill.

DEAR SIR: We are much surprised at contents in yours under date of September 13. We have at no time endeavored to stock up on stove bolts at your expense, all we request of you is that you live up to the contract entered into with you under date of Dec. 14, 1898, which contract you no doubt have a copy.

Yours truly,

EXCELSIOR STOVE & MFG. CO."

"CHICAGO, ILL., Sept. 20, 1899.

THE EXCELSIOR STOVE MFG. CO., Quincy, Ill.

GENTLEMEN: Referring to my letter to you of the 13th, you will notice that during the first six months of this year you bought only 159,000 stove bolts of us. During that six months you should have bought the larger share of the

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amount that you would naturally take on contract for this season, and the fact that you ordered 400,000 in August, and 685,000 in September, shows conclusively that you are trying to take advantage of us on our contract, as your season for buying material for manufacture during the present season has already passed.

Please remember that we are doing business with other concerns in your line, who are not trying to take advantage of us, and we can judge from their orders what your wants should be.

We shall, therefore, decline to accept any more orders from you on our contract, and feel that we are giving you already, if we fill orders already sent us, much more than you are entitled to.

Respectfully yours,

RUSSELL, BURDSALL & WARD,
F. A. MANN, Mgr."

"OCTOBER 7, 1899.

MR. F. A. MANN, Mgr. Russell, Burdsall & Ward,
811 New York Life Bldg., Chicago, Ill.

DEAR SIR: Replying to your valued favor under recent date, we again refer you to our letter sent you Sept. 13, wherein we stated plainly that we were not stocking up on stove bolts at your expense.

We fully expect to use every bolt ordered from you long before your contract expires, and shall look to you to fill our further specifications should our requirements demand it.

Yours truly,

EXCELSIOR STOVE & MFG. Co."

November 7th, appellee wrote appellant :

"We have been buying above sizes of stove bolts from our neighbors for the past two weeks and shall charge your account with the difference in contract price and price which we are compelled to pay for them. We trust you will see necessity of making us shipment of our complete order without further delay."

Again, on the same day :

"As stated in our prior letter, we are daily buying a number of bolts in small lots to tide us over until those ordered from you arrive. We shall of course expect you to reimburse us for the difference paid by us and the contract price."

November 23d, appellant wrote appellee as follows :

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"We have yours making claim on us for a total of \$30.45 for difference in bolts and expressage on same, which you have bought while awaiting bolts from us, which we cannot see the justice of, as there is nothing in our contract with you compelling us to furnish at stated periods.

In all of our large lists of contracts and customers this is the first time we have ever been called upon to reimburse any party for delay in filling orders and this year you very well know that every party manufacturing goods from iron and steel are pushed to their utmost to even partially supply consumers.

We have contracts with Rolling Mills and Wire Mills who have not kept us supplied although we have sent representatives to the Mill to hurry the orders, and certainly we do not consider that we have any money claim on them. We have written our Mr. Mann to call on you when in your vicinity and if you have any just claim he will certainly adjust the same."

December 4th, appellee wrote appellant:

"We are buying daily and charging your account with the difference in prices."

And December 13th:

"As stated in our prior letter we are daily buying these goods from our neighbors and fully expect you to reimburse us for the difference in our cost and the contract price."

February 13, 1900, appellant wrote appellee, as follows:

"We have your memorandum of charge of \$72.15 which you claim as difference that you think we should stand. We notice that you have made the charges at the net price of 62½¢ off, when they should have been at least 62½¢, 10 & 5¢ which would net as follows:

\$122.74, less 10 & 5¢	\$104.94
Less at our discount.....	50.59

\$ 54.35

We certainly cannot see how you can claim any more than the above. We are not willing to concede any more than this and under the circumstances think you will agree with us."

In response to an order by appellee dated February 17th, for 152,000 bolts, appellants on February 19th, wrote as follows:

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"We are just in receipt of your stove bolt order, which will be acknowledged by our Supt., naming time when it can be shipped. This order will be filled at present stove bolt prices, 60, 10, 5% in papers, 2½% allowed in bulk keg lots. If you order a million bolts within the year you are entitled to a rebate of 7½%; or if your purchases do not reach one million, but are over 500,000, you are entitled to a rebate of 5% instead of 7½%."

To this letter, appellee on February 23d, replied thus:

"We note what you state on yours under date of Feb. 19th, and beg to refer you to our contract under date of Dec. 14, '98, and shall expect you to live up to this contract. Kindly advise us by return mail whether or not we understand correctly, that you refuse to fill our order at contract price; we must have immediate shipment of the bolts ordered from you."

And appellant rejoined February 28th, by saying:

"In reply to yours of the 23rd, will say if you will refer to your contract you will see that same expired Jan. 1, 1900. We expect to fill all orders received from you prior to that date at prices as per contract. Any orders received since Jan. 1st, we will be pleased to fill at prices ruling at the time order is received. Do you wish us to so enter your order?"

March 1st, appellee ordered, for immediate shipment, eighteen kegs of stove bolts, and thereupon the following correspondence was had:

"PORT CHESTER, N. Y., Mar. 6, 1900.

EXCELSIOR STOVE & MFG. CO., Quincy, Ill.

GENTLEMEN: We have yours of the 1st ordering 18 kegs of stove bolts, which we will enter at present list and discount, 60, 10% 2½% off 60 days or 2% cash 10 days. Is this as you understand it?

Yours truly,

RUSSELL, BURDSALL & WARD,
Per JOS. H. MARSHALL."

"QUINCY, ILL., March 16, 1900.

RUSSELL, BURDSALL & WARD, Port Chester, N. Y.

GENTLEMEN: Replying to your valued favor under recent date will state that order sent you recently for eighteen kegs stove bolts is to apply on our contract under date of Dec. 14, 1898, which does not expire for some time.

Yours truly,

EXCELSIOR STOVE & MFG. CO.,
JOHN J. FISHER, Pres. & Treas."

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"PORT CHESTER, N. Y., March 19, 1900.

EXCELSIOR STOVE & MFG. CO., Quincy, Ill.

GENTLEMEN: We are in receipt of yours of the 16th, and in reply will say that our contract with you dated Dec. 14, 1898, reads: 'Enter our order for our requirements in stove bolts from date to January 1, 1900.' You will therefore see your contract has expired and we cannot accept your orders received since Jan. 1st to apply on this contract, and we will await your reply whether we shall enter them as your quotation of recent date.

Yours truly,

RUSSELL, BURDSALL & WARD.

H. E. MARSHALL, Asst. Treas."

It is evident that appellant, through inadvertence or otherwise, misquoted that portion of the contract relating to the time of its expiration.

Appellant contends that the letters written by it to the appellee must be construed as a mere declaration of an intention to abandon the contract and did not constitute a breach of the contract; that appellee did not, in fact, accept or act upon appellant's letters as a breach of the contract; and that it was incumbent upon appellee to send orders for bolts to appellant, to be shipped under the contract, before purchasing the same elsewhere. The letters of appellant did not constitute a breach of the contract in the sense that it was abrogated, because the concurrence of appellee would be necessary to effect that result, but we are clearly of opinion that the letters quoted, taken together, from September 13, 1899, to March 19, 1900, evidenced not only a clear purpose on the part of appellant not to abide by the terms of the contract, but also a positive, unequivocal refusal to comply with its terms. In *Roebling's Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 660, it is said: "Where one party to a contract gives notice before the time of performance arrives that he does not intend to perform, the other party may treat such notice as a breach, and bring his action, or he may decline to accept such notice as a breach and may insist that the contract shall continue in force up to the time fixed for its final performance, holding the party refusing to perform responsible for the

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consequences of such refusal. One party to a contract cannot, by simply refusing to carry out his part of it, compel the other party to rescind it. The latter has a right to keep it alive notwithstanding such refusal." By its letter of February 23d, in which it said "We note what you state in yours of Feb. 19th, and beg to refer you to our contract under date of Dec. 14, 1898, and shall expect you to live up to this contract," appellee clearly elected to disregard appellant's refusal to perform, and to keep the contract alive for its (appellee's) benefit. Nor do we think that appellee, after the action of appellant in twice refusing to fill orders under the contract, was required to keep up the needless formality of ordering bolts necessary in its business.

It is urged by appellant that appellee must show, as a condition precedent to a recovery under its pleas of set-off, that it was not in default itself in the performance of the contract; that appellee being in default in its payment for bolts shipped November 2, 1899, payment for which by the terms of the contract, was due sixty days thereafter, or January 1, 1900, could not legally demand that more bolts be shipped to it under the contract, or ask for damages because the same were not shipped. Undoubtedly the rule is, that a defendant pleading a set-off assumes the position of a plaintiff, and in order to recover, is required to prove the same facts he would be bound to prove if he had brought an original action on his demand. *Ellis v. Cothran*, 117 Ill. 458.

It is also a general rule applicable to cases of this character, that a vendee who has accepted goods delivered under an express contract, but not at the time or in the quantity required by it, with knowledge of the default of the vendor in those respects, and who has himself failed, without showing a legal excuse, to pay for them according to the contract, or a readiness and willingness so to do, cannot maintain an action on the contract for the default of the vendor. *Hess Co. v. Dawson*, 149 Ill. 138; *Harber Bros. Co. v. Moffat Cycle Co.*, 151 Ill. 84; *Purcell Co. v. Sage*, 200

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Ill. 342. An examination of the cases cited, and in which, upon an application of the rule, a recovery was denied, will disclose a state of facts very different from those in this case. In the case at bar, appellee repeatedly informed appellant, that owing to the delay in the shipments of bolts ordered, it was obliged to go into the market and purchase bolts required in its business, at prices in excess of the contract price, and had charged appellant with the difference. November 23, 1899, appellant wrote appellee that any just claim in that regard would be adjusted, and on February 19th, following, appellant substantially conceded its liability for a portion of a claim made by appellee. Upon this state of the account, and in the absence of any demand by appellant for payment or settlement, we are not disposed to hold that appellee was in such default as to preclude a recovery of damage.

This suit was commenced by appellant July 2, 1900, and appellee's pleas of set-off were filed, respectively, May 27, 1902, and March 28, 1904. The case was tried April 22, 1904. Upon the trial, the court permitted appellee, under its pleas of set-off, to introduce evidence of the purchase of bolts from other parties up to January 1, 1901, and allowed appellee damages for the amount it was required to pay for bolts so purchased, in excess of the contract price. This action of the court is assigned as error, and it is insisted, that, in any event, appellee could only introduce evidence of such purchases of bolts and recover damages under its pleas of set-off, up to the commencement of the suit, July 2, 1900. Appellee's pleas of set-off, which stand for its declaration, were filed after the contract had expired by its terms and the trial was also had after that time, and upon the authority of Mount Hope Cemetery Ass'n v. Weidenmann, 139 Ill. 67, the action of the court was proper. See also, Hercules Coal & Mining Co. v. Central Investment Co., 98 Ill. App. 427.

The judgment in this case must be reversed and the cause remanded, because the only evidence offered by appellee of the quantity and prices of bolts purchased by it from

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parties other than appellant, and upon which purchases appellee's claim for damages is based, consisted of invoices received by appellee from the various sellers. True, the witness Fisher made a pretense of having an independent recollection of the different transactions involving purchases of bolts, but an examination of the record makes it clear that his claim in that regard was mere pretense and that his testimony was based entirely upon a reading of the invoices and not upon his personal knowledge or recollection of the transactions. The transaction in question involved fifty or more separate invoices of bolts, purporting to show sales to appellee, from October 26, 1899, to December 23, 1900, the invoices in many instances containing several different items ranging in amount from a few cents to several hundred dollars, and it is incredible that the witness could have testified of his personal knowledge with respect to the same.

The objections interposed by counsel for appellant, to the manner in which the sales in question was sought to be shown, should have been sustained, and appellee required to make competent primary proof upon that subject.

The contract in question is for appellee's "requirements" in stove bolts from December 14, 1898, to January 1, 1901, and this means such amount of stove bolts as appellee should need in the regular course of its business and not what appellee might choose to require from appellant. *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85. Upon another trial, appellee should make more definite proof that the bolts purchased by it were within its requirements, as here construed.

The judgment is reversed and the cause remanded.

Reversed and remanded.

**William Wood and Mary E. Everman, Executors, v.
D. J. Stewart.**

1. ADMINISTRATION ACT—*sections 7 and 8 construed together.* Sections 7 and 8 of the Administration Act are in *pari materia* and therefore should be construed together.

2. EXECUTORS—*when court of probate may require security of.* Where a testator by his will directs that his executors shall not be obliged to give security, the court of probate should not require such executors, upon application for leave to sell real estate to pay debts, to give security, unless it shall see from its own knowledge or from the suggestion of creditors or legatees (beneficiaries) that fraud may be practiced or that the personal estate will not be sufficient to discharge the debts.

3. EXECUTORS—*what does not confer jurisdiction upon court of probate to require security of.* A petition by one neither a legatee (beneficiary) nor a creditor will not confer jurisdiction upon the court of probate to require executors to give security where the will has waived the same.

4. STATUTE—*rule of construing, that affirmative implies the negative.* When a statute is in the affirmative that a thing shall be done by certain persons or in a certain manner, the affirmative directions imply a negative that it shall not be done by other persons or in another manner.

Contest in court of probate. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

PATRIDGE & PATRIDGE, for appellants.

JOHN E. POLLOCK and J. M. WEAKLY, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Appellee filed his petition in the County Court of McLean County, averring that Rufus Wood died testate, November 10, 1903; that by his last will and testament and codicil thereto, the said Rufus Wood devised and bequeathed to appellants, his executors, all his property, consisting in part of 166 acres of land in McLean county, worth \$15,000, in trust, with power to sell and divide the net pro-

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ceeds equally between his five children, Mary E. Everman, William A. Wood, Sarah F. Bryan, Amanda C. Whitman and Elton M. Wood; that by his will, said testator waived the giving of any security by said executors; that said executors intend soon to sell and convey said real estate; that appellee is a judgment creditor of Elton M. Wood, one of the legatees under said will of Rufus Wood, in the sum of \$1,523 and that if said executors are allowed to sell said real estate without giving bond with security, to cover the proceeds of said sale, there is danger that appellee's judgment may not be paid, or that appellee would be put to great trouble and expense to collect it. The petition prays that an order may be entered requiring appellants to give a good and sufficient bond with sureties, to secure the proceeds of the sale of said real estate. The County Court granted the prayer of the petition and ordered appellants, before proceeding to sell said real estate, to enter into bond with good and sufficient security in the sum of \$30,000 to secure the proceeds of said sale. Appellants perfected an appeal to the Circuit Court, where they interposed a general and special demurrer to the petition, which was overruled and a like order there entered. This appeal followed.

The grounds of demurrer, are, first, that appellee has not in and by said petition shown that he is either a creditor or a legatee of said testator, and second, that he has not shown that he suspects the executors of fraud, or that the personal estate belonging to said testator will not be sufficient to discharge all the debts against his estate.

Sections 7 and 8 of the Administration Act, are as follows:

"Sec. 7. All executors, hereafter appointed, unless the testator shall otherwise direct in the will, and all administrators with the will annexed, shall before entering upon their duties, enter into bond with good and sufficient security, to be approved by the county court, and in counties having a probate court, by the probate court, in a sum double the value of the personal estate, and payable to the People of the State of Illinois, for the use of the parties interested, in the following form, to-wit: * * * Which

said bond shall be signed and sealed by the said executor (or administrator) and his securities, and filed in the office of the clerk of the county court, or office of the clerk of the probate court in counties having a probate court, and spread upon the records; and when it becomes necessary to sell the real estate of any intestate, for the payment of debts against his estate under the provisions of this act, or in case real estate is to be sold under the provisions of a will, the court shall require the executor (or administrator) to give further and additional bond, with good and sufficient security to be approved by the court, in a sum double the value of the real estate of the decedent sought to be sold, and payable to the People of the State of Illinois, for the use of the parties interested, in the form above prescribed.

"Sec. 8. When any testator leaves visible estate more than sufficient to pay his debts, and by will shall direct that his executors shall not be obliged to give security, in that case no security shall be required, unless the county court shall see cause, from its own knowledge or the suggestions of creditors and legatees, to suspect the executors of fraud, or that the personal estate will not be sufficient to discharge all the debts, in which case such court may require security, and the same shall be given before or after letters testamentary are granted, notwithstanding any direction to the contrary in the will."

These sections of the statute are in *pari materia*, and are to be construed together.

Where the testator, by his will, directs that his executors shall not be obliged to give security, the sections quoted, construed together, do not authorize the County or Probate Court to require such executors to give security, unless the court shall see cause, from its own knowledge, or the suggestions of creditors or legatees, to suspect the executors of fraud, or that the personal estate will not be sufficient to discharge all the debts.

It is a familiar rule applicable to and controlling in, the construction of statutes, that when the law is in the affirmative that a thing shall be done by certain persons or in a certain manner, the affirmative direction contains a negative that it shall not be done by other persons or in another manner, under the maxim *expressio unius est exclusio alterius*.

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The ruling of the court requiring appellants to give security, was not made upon its own motion for cause apparent to it, and the propriety of a ruling so made, is not before us for review. By express provisions of the statute, suggestions as to the necessity or propriety of executors in such cases, giving security, may only be made to the court by creditors and legatees. Appellee is neither a creditor nor a legatee of the testator, and any suggestion from him by petition, could not set the court in motion or give it jurisdiction to enter an order requiring appellants to give security.

The judgment is reversed and the cause remanded with directions to the Circuit Court to sustain the demurrer.

Reversed and remanded with directions.

M. M. Morrissey, Administrator, v. Jennie Rogers.

1. COMMISSION—*when administrator not entitled to.* An administrator is not entitled to charge commissions upon an item which was not actually received by him but which as a matter of bookkeeping might properly be included in his report.

2. ADMINISTRATOR'S REPORT—*what not res judicata of item of.* The fact that upon the filing by an administrator of his first report no objection is made upon a particular item, although other items are objected to, does not waive the right of the party who has so objected, subsequently to object to such item upon the filing by the administrator of a supplemental report.

Contest in court of probate. Appeal from the Circuit Court of McLean County; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

D. D. DONAHUE and H. M. MURRY, for appellant.

EDMUND O'CONNELL, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

The only question involved in this appeal, is whether

appellant as administrator of the estate of Augustus W. Rogers, deceased, is entitled to charge and be allowed a commission upon \$3,000, as claimed by appellant or upon \$1,334.18 as ascertained and determined by the Circuit Court. If appellant ever filed an inventory of the property of his intestate, it does not appear either in the record or abstract, and we must look to his purported final report filed December 30, 1902, to ascertain the value of the estate represented as coming into his hands. In that report appellant charged himself with the sum of \$3,000 represented as having been realized from a sale to R. C. Rogers of the interest of his intestate in certain personal property. Appellee having filed objections to the allowance of certain items of credit claimed by appellant in said report and also as to other matters, not here involved, a hearing was had thereon resulting in an order of the court sustaining the objections in part. Appellant thereafter on December 23, 1903, filed his so-called "final supplemental report" in which he complied with the order of the court entered upon the hearing of the objections referred to, and in which supplemental report as in his prior report he credited himself with the sum of \$180 as commission at 6 per cent. upon the sum of \$3,000. Appellee filed her objection to the allowance to appellant of \$180 as commission and upon a hearing thereon, the objection was sustained by the County Court and an order entered finding that appellant was only entitled to commission upon the sum of \$1,334.18; fixing such commission at \$80.05, and requiring appellant to account for the difference, \$99.95. Appellant perfected an appeal to the Circuit Court, where the matter was heard and a like order entered. This appeal followed.

At the time of his death, appellant's intestate had an unascertained interest in the personal estate of his father, which, through the efforts of an attorney employed by appellee under a contingent fee agreement, netted \$1,309.38. This interest appellant appears to have sold to R. C. Rogers, a brother of appellant's intestate, for his purported bid therefor of \$3,000. R. C. Rogers had made advancements

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from time to time to his brother Augustus, amounting in the aggregate to \$1,690.62, for which amount he filed a claim against the estate, which was allowed by the County Court with the consent of appellant. Appellant then took the receipt of R. C. Rogers for the amount of such advancements allowed as a claim against the estate, and received the difference, \$1,309.38, in cash. While upon the face of the record there is a semblance of justification for appellant charging himself with the sum of \$3,000, as received from R. C. Rogers, we are of opinion the justification is more shadowy than substantial and that there was no basis in fact for estimating the interest of Augustus W. Rogers realized from his father's estate, at \$3,000.

It is insisted by appellant, that appellee not having objected to the item of commission in the report filed December 30, 1902, the question was *res judicata* upon the filing of the final supplemental report December 23, 1903. This insistence is not tenable. The report filed December 23, 1903, was the only final report of appellant as administrator, and it was within the power of the County Court upon the presentation thereof, to hear testimony for the purpose of correcting that or any former report filed by him, and to enter an appropriate order making such correction as the evidence justified. *Marshall v. Coleman*, 187 Ill. 556.

The judgment of the Circuit Court was right and will be affirmed.

Affirmed.

Springfield Electric Light & Power Company v. John J. Mott.

1. ASSUMED RISK—when instruction upon, properly refused. An instruction upon the subject of assumed risk is properly refused where no such defense was interposed in the trial of the cause.

2. INSTRUCTION—when refusal of "cautionary," not error. Where an instruction belonging to the class termed "cautionary" is asked, which embodies a number of propositions, it is not error for the court to refuse the same where he has properly determined to refuse such instruction upon any one of the propositions enumerated.

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Action on the case for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

WILSON, WARREN & CHILD, for appellant.

R. H. PATTON and E. E. BONE, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Appellee recovered a verdict and judgment against appellant in the Circuit Court of Sangamon County, for \$1,000, for a personal injury alleged to have been sustained by him while unloading electric light poles from a wagon. It is urged by appellant for a reversal of the judgment, that the verdict is against the manifest weight of the evidence upon the issue as to whether the injury complained of resulted in the manner alleged in the declaration and testified to by appellee, and upon the issue as to whether appellee and appellant's foreman, Flannigan, whose negligence it is alleged caused the injury, were fellow-servants; and that the trial court erred in giving and refusing instructions.

On November 3, 1903, appellee was one of a gang of men employed by appellant in unloading and setting poles in the city of Springfield. R. L. Flannigan was foreman of the gang, having authority to employ and discharge men and to direct the conduct of the work.

Appellee's right of recovery in this case is predicated upon his uncorroborated version of the occurrence in question. He testified, that in response to the call of the foreman Flannigan, he and one Evans went to Flannigan's assistance in unloading poles from a wagon; that they lifted the large end of the pole from the wagon bed onto the front wheel of the wagon and lifted the small end of the pole onto the hind wheel; that while the pole was resting on the four-inch tires of the wagon wheels, Flannigan directed appellee and Evans to "hold it;" that Evans held the pole at the small end and appellee at a point five or six feet from the small end, about as high as he could reach; that

Flannigan, without giving any warning as to what he was going to do, went to the opposite side of the wagon and jerked the large end of the pole with a crow-bar; that as the large end of the pole went down the small end went up and threw appellee down and under the pole; that as he was jerked up and thrown down he felt something burst in his bowels; that he lay under the pole on the ground about ten seconds before he was able to crawl out; that the injury immediately developed an external swelling as large as his arm, diagnosed by the physician, who attended him for the first time on June 22, 1904, as an inguinal hernia. The witnesses Evans, Flannigan, Womach and DeFrates, all of whom were within a few feet of appellee and in a position to observe what took place when, as he testifies, he was thrown down and laid on the ground ten seconds, did not see him struck or jerked by the pole or fall to the ground. To none of the persons present, did appellee mention the fact of his injury, except as he testifies, he said to Evans, "By gosh, that pretty near done me up," and as to this alleged remark he is not corroborated by Evans. Notwithstanding the serious and painful injury claimed to have been then sustained by appellee, he continued the work of digging holes the same day and for days and weeks immediately following. That appellee has a hernia does not admit of doubt, but it is incumbent upon him to show by a preponderance of the evidence that it resulted from the negligence of appellant upon the occasion and under the circumstances alleged in his declaration. We have no hesitancy in saying that this appellee failed to do, and that the verdict of the jury upon that issue is against the manifest weight of the evidence in the record.

There is a direct conflict between appellee and Flannigan as to the alleged direction by the latter to the former, "to hold" the pole. If such direction was given by Flannigan in his capacity as foreman or vice-principal, and while in obedience to such direction appellee was injured by the negligence of Flannigan as alleged in the declaration, appellant is liable. These were questions of fact, properly submitted to the jury for determination.

The court did not err in giving the first instruction offered by appellee. Assumption of risk by appellee was not interposed as a defense in the case, and the declaration alleged all the facts necessary to be proven, to authorize a verdict against appellant.

The court refused to give to the jury, what purported to be a single instruction, offered by appellant, advising the jury, first, that it was their duty to find a verdict from the evidence under the instructions of the court; second, that all of the instructions had application to the facts in controversy in the case; third, that they must not disregard or go contrary to such instructions, nor find a verdict contrary to the law as set forth in such instructions; fourth, that they must not arrive at their verdict, or any part of it, by lot or by chance; fifth, that no juror should consent to a verdict which does not meet with the full approval of his own judgment and conscience after due consideration of the evidence and the law as set forth in the instructions, and after due deliberation with his fellow jurors. The instructions embodied in this request are what are termed, cautionary instructions, the giving or refusing of which is largely discretionary with the trial judge. The fourth and fifth instructions in the foregoing, are of doubtful propriety in any case, and while it would not be error to give them, they may well be refused and such refusal would not warrant a reversal. These instructions having been tendered to the trial judge in gross, if he determined in the exercise of his judicial discretion to refuse any one of them he was justified in refusing all, and we are not disposed to hold that he erred in so doing.

Because this judgment is predicated upon a verdict rendered against the manifest weight of the evidence, it will be reversed and the cause remanded.

Reversed and remanded.

C. W. Dooley & Co. v. Hasenwinkle Grain Co.

C. W. Dooley & Company v. Hasenwinkle Grain Company.

1. *WARRANTY—extent of defendant's right upon suit for purchase price.* Where the defendant is sued for the purchase price of merchandise, he can only set up a breach of warranty in mitigation of damages.

2. *WARRANTY—measure of damages for breach of.* Where a breach of warranty is interposed as a defense, the measure of the defendant's right to mitigate damages is the difference between the value of the machine at the time of the breach and what it would have been worth had the warranty been true.

Action commenced before justice of the peace. Appeal from the Circuit Court of McLean County; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

JAMES L. LOAR, for appellants.

D. D. DONAHUE, LOUIS FITZHENRY and H. M. MURRAY, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

This is a suit originally commenced before a justice of the peace by appellants against appellee to recover the price of a car loader, sold upon an order therefor, as follows:

“JULY 24, 1901.

C. W. DOOLEY & Co.

Please send me one Ideal Car Loader, to be shipped to Heyworth, Ill., as soon as possible, in consideration whereof we agree to settle for the same in the following manner: Within thirty days after receipt and adjustment of the car loader, as above specified, we agree to remit to C. W. Dooley & Co., Bloomington, Ill., or their authorized agent, the sum of \$90.00, less freight. It is understood and agreed that this car loader is purchased subject to all the terms and conditions of the C. W. Dooley & Co.'s warranty and agreement as printed upon the back of this order, a copy of which we have received and accepted.

(Signed) HASENWINKLE GRAIN Co.”

The order was subject to the following warranty:

“The Ideal Car Loader for which this order is given is

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hereby purchased and sold subject to the following warranty and agreement which no one has authority to add to, abridge or change in any manner. That it is well made, of good material, and will do first class work provided instructions as sent out with the loader are followed. It will load grain into a car at the rate of from 1,800 to 2,000 bushels per hour. The purchaser shall have thirty days from receipt and adjustment of the loader to give it a fair trial and if it should not work well, written notice stating wherein it fails, to be immediately given by the purchaser to C. W. Dooley & Co., at Bloomington, Ill., and reasonable time allowed them to write special instructions regarding the difficulty or to send a person to remedy the defect, if any, (the purchaser rendering friendly assistance) when if it cannot be made to do the work as specified above, it shall be returned to the place where received, and a new machine will be given free of charge, or the purchase price shall be refunded, provided same has been paid, at the option of the vendor. Continued possession of the loader after thirty days' trial shall be conclusive evidence that the warranty is fulfilled."

There was a verdict in the court below for appellee and judgment thereon against appellants for costs.

It is urged for reversal of the judgment, first, that the verdict is against the weight of the evidence upon the issue as to whether the car loader complied with the warranty; second, that appellee, having failed to return the car loader, as required by the contract, cannot set up a breach of the warranty, as a defense in this action to recover its price; and third, that the court gave erroneous instructions to the jury.

The evidence is close and conflicting upon the issue as to whether the car loader fulfilled the terms of the warranty, and was that the only question presented for our determination we should not be disposed to interfere with a verdict and judgment predicated upon a finding against appellants on that issue.

By the term of the contract, if the car loader could not be made to work as specified in the warranty, appellee was bound to return it to appellants at Bloomington, and this it should have done unless it was excused from so doing.

Appellee may not, under its contract, be permitted to retain the article purchased and avoid payment therefor in whole, upon the ground that it did not comply with the warranty. We are not concerned, as suggested by counsel for appellee, with the reason or equity of requiring appellee to return the car loader to appellants, but with the obligation appellee voluntarily assumed by the terms of the contract, so to return it. The record does not disclose any sufficient excuse for appellee's failure to return the car loader, and it can only be permitted to show a breach of the warranty in mitigation of damages. *Aultman & Co. v. Johnson*, 45 Ill. App. 313; *Hoover & Gamble v. Doetsch*, 54 Ill. App. 65.

The third instruction given at the request of appellee was erroneous in interpreting the provision of the warranty, "that it is well made," to mean that the car loader would do the work for which it was intended. The words quoted relate, we think, to the quality of the workmanship in the construction of the car loader and not to its efficiency in operation. The instruction was also erroneous because it denied appellants any measure of recovery, if there was a breach of the warranty. Appellee having failed to return the car loader, the measure of damages for a breach of the warranty, was the difference between the value of the machine at the time of the breach, and what it would have been worth had the warranty been true. The fifth instruction given at the request of appellee is also subject to the objection last mentioned. The sixth instruction infringed upon the province of the jury.

By the seventh instruction, the court informed the jury, "that the provision of the warranty, 'It will load into a car at the rate of from 1,800 to 2,000 bushels per hour,' was an agreement made by C. W. Dooley & Co. that the car loader would load at least 1,800 bushels of grain into a car per hour when operated for a period of thirty days after the car loader was adjusted in the elevator." In view of evidence, tending to show that there were necessary interruptions in the operation of loading a car and that the

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machine was not ordinarily operated continuously for one hour, we think the instruction was misleading. The warranty was, that the car loader would load into a car *at the rate of* 1,800 to 2,000 bushels per hour, not that it would load at least 1,800 bushels every hour it was operated.

For the error indicated, the judgment must be reversed and the cause remanded.

Reversed and remanded.

Charles Bogardus v. Phoenix Manufacturing Company.

1. GUARANTY—*when separate instrument construed as a part of.* Where the guaranty executed by the defendant makes special reference to a proposition made by the parties to the original transaction, such proposition will be construed as a part of the contract of guaranty.

2. DECLARATION—*how performance of contract should be alleged.* The performance of a contract should be alleged in a declaration not by way of stating the legal conclusions, but by setting up the facts from which the legal conclusions may be drawn by the court.

Action of assumpsit. Appeal from the Circuit Court of Ford County; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

KERR & LINDLEY and M. H. CLOUD, for appellant.

C. E. BEACH and F. M. THOMPSON, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

By its written proposition, bearing date October 10, 1901, the Phoenix Manufacturing Company, by A. E. White, its salesman, proposed to furnish to one Niels C. Nielson, certain mill machinery and apparatus to be shipped on or before November 1, 1901, to Charles Bogardus at Pellston, Michigan. The price was thereby fixed at \$2,620 payable in New York, Chicago or Milwaukee exchange, free of expense to payee for collection charge, one-third in twelve

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months, one-third in eighteen months, and balance in twenty-four months from date of shipment, to be evidenced by notes of said Nielson bearing 6 per cent. interest. The proposition was made for immediate acceptance and it was provided that if accepted it should constitute a contract, subject to the approval of the Phoenix Manufacturing Company, at its office in Eau Claire, Wisconsin. The proposition was accepted by Nielson, October 11, 1901. The following contract of guaranty was then executed by appellant, Bogardus:

“PELLSTON, MICH., Oct. 11, 1901.

PHOENIX MFG. CO., Eau Claire, Wis.

GENTLEMEN: It is understood between Mr. A. E. White, representing you, and myself, that upon the fulfillment of a contract made and entered into on the 10th day of Oct., A. D. 1901, between Niels C. Nielson, of this place, and yourselves, and whereby he is to execute three promissory notes in payment for machinery mentioned in said contract, amounting to \$2,620.00, payable as follows: One-third in twelve months, one-third in eighteen months, balance in twenty-four months from date of shipment, with interest at 6 per cent. from said date of shipment, then in that case I will be responsible for said notes as they mature if said Niels C. Nielson shall fail to make such payment; and it is further agreed that said notes or either of said notes, shall be assigned to said Charles Bogardus at any time upon his request, he paying the amount of the principal and interest to that date.

Yours truly,

CHARLES BOGARDUS.”

This is a suit in assumpsit by appellee against appellant, to recover upon the said contract of guaranty, the amount due by the terms of a certain note as follows:

“\$873.33.

PELLSTON, MICH., Nov. 13, 1901.

Twelve months after date, for value received I promise to pay to the order of the Phoenix Manufacturing Co., of Eau Claire, Wis., Eight Hundred Seventy-Three 33-100 dollars, at First State Bank of Petoskey, Mich., with interest at the rate of six per cent. per annum.....until paid, and cost of collection and exchange.

Due Nov. 13, 1902.

NIELS C. NIELSON.”

The declaration alleges that appellee approved the proposition referred to, October 12, 1901, at its office in Eau Claire, Wis., "and on, to wit: the 1st day of November, 1901, furnished and delivered the said articles of machinery as described in said proposition and in conformity with the provisions of said proposition;" that on the 13th day of November, 1901, the said Nielson received said machinery and executed his three promissory notes, bearing date November 13, 1901, each for the sum of \$873.33, payable to appellee at First State Bank, Petoskey, Mich., in twelve, eighteen and twenty-four months, respectively, after date, with interest at the rate of 6 per cent. per annum.

Appellant interposed a general and special demurrer to the declaration, which was overruled by the court, and appellant electing to abide by his demurrer, judgment was rendered against him for \$999.95, being the amount due upon the first note mentioned in the declaration.

The guaranty contract executed by appellant, makes special reference to the proposition made by appellee to Nielson, which became a binding contract between the parties to it, and the two contracts must be taken and construed together. *Bartlett v. Wheeler*, 195 Ill. 445. A liability upon the part of appellant to appellee, under the guaranty contract, could only accrue for the default of Nielson, upon a substantial compliance by appellee with the provisions of its contract with Nielson. Some of the provisions of the latter contract were beneficial to appellant, and doubtless the consideration in part which moved him to execute the guaranty contract. The liability of a guarantor, while not to be limited by implication beyond the terms of the contract (*Taussig v. Reid*, 145 Ill. 488; *Mamerow v. National Lead Co.*, 206 Ill. 626), is not to be extended by implication beyond its terms. *Shreffler v. Nadelhoffer*, 133 Ill. 536; *Tolman Co. v. Rice*, 164 Ill. 255.

The guaranty contract, by its terms, became effective upon the fulfillment by appellee of its contract with Nielson. It was provided in the latter contract that the machines should be shipped to appellant at Pellston, Michigan,

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on or before November 1, 1901, and that the notes to be executed by Nielson should be payable in twelve, eighteen and twenty-four months from date of shipment. The declaration alleges that appellee "On to-wit, the 1st day of November, 1901, furnished and delivered the said articles of machinery as described in said proposition and in conformity with the provisions of said proposition." In pleadings, facts only should be stated and tendered as issues, and not inferences, conclusions or matters of law. The construction of the contract was a question of law for the court, and the allegation in the declaration above quoted is the mere conclusion of the pleader and tenders an issue of law and not of fact. The declaration should set forth the acts alleged to be in conformity with the provisions of the contract.

Appellant, by the terms of the contract, guaranteed the payment of certain notes to be executed by Nielson, and made payable twelve, eighteen and twenty-four months from date of the shipment of the machinery. The contract between appellee and Nielson provided for the shipment of the machinery on or before November 1, 1901, and that the notes to be executed by Nielson should be made payable in twelve, eighteen and twenty-four months from date of shipment. The note described in the declaration, the payment of which Nielson is alleged to have defaulted, and for which appellant is sought to be held liable, was made payable twelve months from November 13, 1901, thirteen days later than the note, payment of which appellant guaranteed by the terms of his guaranty contract, and is not sufficiently identified, to bind appellant under his contract of guaranty.

Other objections are urged to the sufficiency of the declaration, but we do not regard them of sufficient importance to justify further discussion. For the reasons given, the demurrer to the declaration should have been sustained. The judgment will be reversed and the cause remanded.

Reversed and remanded.

Moses S. Beyer and Joseph S. Yentes, Partners, v. Samuel Martin.

1. INSTRUCTION—*when refusal to give, warning against newspaper article, not error.* An instruction which warns the jury against being influenced by a newspaper article, belongs to that class of instructions termed "cautionary," and such refusal is not error unless it appears that the discretionary power of the court to give or refuse such instruction has been abused.

2. INSTRUCTION—*phrase "financial settlement" used in, not misleading.* This phrase, as used in an instruction, held, equivalent to "final settlement" and not misleading or prejudicial.

3. INSTRUCTION—*must not ignore theory of recovery.* An instruction is improper which ignores any theory upon which a recovery might properly be predicated in a cause.

Action of assumpsit. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1904. Affirmed. Opinion filed April 20, 1905.

KERRICK & BRACKEN, for appellants.

W. B. COONEY and W. R. CURRAN, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

May 17, 1900, appellants entered into a written contract with appellee, whereby appellee was to erect a saw mill upon timber land belonging to appellants, on the Illinois river bottom, and saw lumber from such timber and deliver the same upon the river bank. The price to be paid to appellee for such lumber was \$7.50, \$8.50 and \$9 per thousand feet according to dimensions. Payment was to be made at the end of each month for lumber so sawed and delivered. In July following, the contract was supplemented by giving to appellee the right to saw all lumber on 1,500 acres, appellee to saw 600,000 feet per annum. This suit was brought by appellee to recover an amount claimed to be due him for lumber sawed and not paid for at the contract price and for damages sustained by him in not being permitted to perform his contract according to its terms.

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There have been three trials of the case: the first resulting in a verdict in favor of appellee for \$1,200, which was set aside by the trial court; the second, resulting in a verdict and judgment in favor of appellee for \$814.75, which judgment was, upon appeal, reversed, and the cause remanded by the judgment of this court (109 Ill. App. 1); and the third resulting in a verdict and judgment in favor of appellee for \$800, from which judgment this appeal is taken. The suit was instituted in Tazewell county and two trials had there. The venue was then changed upon the application of appellants to McLean county, where the case was last tried.

It is urged that the verdict is not supported by the evidence. There is a wide discrepancy in the evidence introduced in behalf of the contending parties, with reference to the quantity of lumber sawed by appellee; whether the same was edged up and free from bark as required by the contract; whether appellee had been paid in full, upon the occasion of an alleged final settlement with appellants, and whether appellee, to his injury, was prevented by appellants from continuing work under the contract. The record in the case is voluminous and it would unduly extend this opinion to set out and consider in detail the various items involved. The account as stated by the respective parties to the litigation varies very materially, appellants' account showing that they have over-paid appellee for work done under the contract and appellee's account showing that there is still due him from appellants the sum of \$811.31.

Over the objections of appellants the court permitted appellee to offer in evidence as "Exhibit 8," page 5 of a certain book, identified by the witness Jackson, as containing a correct summary of the aggregate amount of lumber sawed by appellee under the contract. It was not a book of original entries, even upon the theory advanced by counsel for appellee that the amount of lumber cut daily by each sawyer was by him marked upon a slate and then transferred to a pencil memorandum book and so ultimately found its way into the book offered in evidence. Clearly

what appeared in the book did not purport to be a copy of the slate or of the pencil memorandum book, but merely a summary in the aggregate, of the quantity of lumber, in feet, sawed by appellee from "July 23 to Sept. 27," from "Sept. 27 to November 1" and "after November 1." If appellee's claim, as to the quantity of lumber sawed by him, was not supported by other and competent evidence in the case, we should not hesitate to say there was no evidence in the record upon that question. Appellee testified that he sawed under the contract "203,000 and some feet, of lumber" and about 4,000 feet of crating. The witness Jackson testified that 1,016 logs were sawed into lumber and that they produced about 200,000 feet. The witness Atkinson testified that he sawed about 100,000 feet. The witness Shrefler testified that he sawed about 3,000 feet. The witness Fleshman testified that he ran the saw two months, being about the same length of time as the witness Atkinson, who preceded him, operated it, and sawed 100,000 feet. We think the jury were warranted in finding from competent evidence in the record, that appellee produced something over 200,000 feet of lumber under his contract.

It is insisted that the court erroneously sustained objections to questions propounded by appellants' counsel to the witness Schertz for the purpose of ascertaining whether such witness had not agreed at or about the time he purchased the saw mill from appellee, to pay appellee for cutting and hauling the logs that were in the timber and mill yard at the time appellee ceased work under his contract, and whether witness had not in fact paid appellee therefor. Appellee claimed nothing from appellants in that regard, but as to the logs mentioned, only claimed damages from appellants, for loss of profits sustained in not being permitted to saw them into lumber. Appellee's objections to the questions were therefore properly sustained.

It was claimed by appellee that he was wrongfully compelled by appellants to quit his contract with them and thereby sustained damages to the amount of \$3 per thousand feet, as profits he would have realized by sawing into

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lumber the logs on hand at that time. There is evidence tending to show that the logs then on hand would scale 121,496 feet in lumber; that appellants had not settled with appellee at the end of each month for lumber delivered as provided by the contract; that appellant Beyer told Schertz, that he had a mill to sell, referring to appellee's saw mill; that Schertz subsequently offered appellee \$100 for the mill; that appellant Yentes then told appellee, that if he (appellee) sawed the logs on hand he (Yentes) would not pay for them; that Yentes asked appellee if he had sold the mill yet, and upon appellee's replying that he had not, that he had only been offered \$100 for it, Yentes said to appellee: "You had better sell; \$100 is better than nothing and if you don't sell I will close it out by the 9th of next month;" that appellee at that time was ready, able and willing to proceed under his contract.

We are not prepared to say that the foregoing evidence does not tend to sustain appellee's contention that he was wrongfully prevented from completing his contract with appellant. Aside from any reference by appellant Yentes of his intention to close appellee out by a certain date, we think his statement to appellee that he would not pay for sawing logs then on hand, was a threat which operated to induce appellee to dispose of the mill upon the best terms obtainable.

By the first instruction given at the request of appellee, the jury were told to "totally disregard any and all newspaper statements concerning the case, if any have come to your notice during the trials." Appellants' criticism of this instruction is that "it was probably taken by the jury to mean that the appellants, or some one for them, had procured newspaper statements to be made that were untrue and prejudicial to appellee." This instruction belongs to a class, designated as "cautionary instructions," the giving or refusing of which, is largely discretionary with the trial court. In this case we must assume that the trial judge properly exercised such discretion in giving the instruction. Instructions given in a case are not the instruc-

tions of the plaintiff or defendant, but the instructions of the court upon the law applicable to the case. The 13th instruction given at the request of appellee, informed the jury that the burden was upon appellants to prove that a financial settlement was made between the parties, upon November 8, 1900. It appears from the evidence, that upon that date appellee gave to appellants his receipt for \$350, and that the receipt contains the words "in full settlement of all accounts up to date." Appellee testified that the sum of \$350 was paid to him in response to his letter to appellants bearing date November 2, 1900, in which he said: "The men are all going to quit if they don't get their money. It will take about \$350 to pay up." It was contended by appellee that the words, "it will take about \$350 to pay up," referred to the amount necessary to pay the men working for him and not to the amount due him from appellants upon the contract. Appellee also testified that the words, "in full settlement of all accounts up to date," did not appear in the receipt at the time he signed it. The instruction related to these issues in the case, and it is urged that the use of the words "financial settlement" tended to mislead and confuse the jury. "Financial settlement" must have been understood by the jury as equivalent to a final settlement of the accounts between the parties, and in that sense the words are not misleading or otherwise objectionable. The 14th instruction given at the request of appellee is not susceptible of the construction put upon it by appellants. The 2nd instruction tendered by appellants and refused by the court, was properly refused because it singles out one transaction as decisive of appellee's right to recover. By the 3rd and 4th instructions given at the request of appellants, the jury were fully and fairly advised as to the law governing the same issue.

While we are not entirely satisfied that appellee has been damaged to the extent of the verdict and judgment in the case, it is manifest from the verdict of three juries, sanctioned by at least two trial judges, that he has sub-

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stantial grounds for recovering damages against appellants, and we are not disposed upon this record to say that the verdict is so manifestly against the weight of the evidence as to justify us in setting it aside. The judgment of the Circuit Court is affirmed.

Affirmed.

MR. JUSTICE PUTERBAUGH took no part in the decision of this case.

George F. Lord v. Thomas O. Johnson.

1. LANDLORD AND TENANT ACT—*sections 29 and 31 not construed together.* Sections 29 and 31 of the Landlord and Tenant Act are separate and distinct and should not be construed together.

2. DISTRESS FOR RENT—*when does not lie.* A distress for rent does not lie to enforce the lien for rent given by section 31 of the Landlord and Tenant Act.

3. DISTRESS FOR RENT—*when does not lie.* The remedy by distress is not available to recover damages for the breach of general covenants in a lease.

4. THEORY OF RECOVERY—*when waived.* Where the counsel for the plaintiff specifically withdraws from the jury a particular theory of recovery, he may not thereafter urge the same.

Distress for rent. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

LILLARD & WILLIAMS, for appellant.

CHARLES I. WIEL, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

This is a distress for rent proceeding instituted by appellant against appellee in the County Court of McLean County. The venue was changed to the Circuit Court, where a trial was had before a jury, and a verdict rendered, by direction of the court, in favor of appellee. The court entered judgment upon the verdict and this appeal followed.

Appellee was a tenant of appellant under a written lease providing for the payment of an annual rental of one-half of all the oats, corn or other grain, delivered, threshed or shelled free of any expense, and \$81 for pasture land. Covenants in the lease required appellee, among other things, to cultivate properly and care for hedges on the farm; to mow the weeds before going to seed, along and under all fences; not to allow any cockle-burs or butter-prints to grow on the land and to distribute all manure upon the premises as appellant might direct. The distress warrant was issued and levied for the recovery of \$150, being the amount claimed to be due to appellant "on the first day of March, 1903, for rent and damages for non-fulfillment of the terms of the lease." There was personal service of summons upon appellee and a plea by him to the merits of the action.

The action of the court in giving peremptory instruction is assailed upon two grounds: first, that appellant was authorized to distrain for the amount of damages as rent, which the evidence might show he had sustained by the failure of appellee to fulfill the covenants in the lease; and second, that regardless of the distress issue, appellant had, under the plea of appellee to the merits, a clear right to a general judgment against appellee for anything that might be shown to be due appellant under the terms and covenants of the lease. Upon the trial there was evidence tending to show that there was due to appellant from appellee, as rent, twelve bushels of corn. Appellant then offered to show that appellee had failed to perform certain covenants in the lease hereinbefore mentioned, together with the value of the labor necessary to perform such covenants, claimed by appellant to amount in the aggregate to \$150. The court rejected the offer upon the grounds that the performance by appellee of such covenants in the lease could not properly be denominated rent; that appellant's right to distrain was limited to rent due and could not be extended to enforce the performance of the covenants involved. Counsel for appellant thereupon withdrew from the record

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the evidence as to the corn rent then due, and all claim therefor, and stated to the court as his reasons for so doing that he desired a clean-cut issue upon the point raised.

It is insisted by appellant that the covenants in the lease here involved, to be performed by appellee, are to be regarded as rent, and that by express provisions of sections 29 and 31 of the act entitled Landlord and Tenant, distress is available as a remedy to recover damages, as rent, for a breach of such covenants. The sections of the statute referred to are as follows :

Section 29. "When the rent is payable wholly or in part in specific articles of property or products of the premises, or labor, the landlord may distrain for the value of such articles, products or labor."

Section 31. "Every landlord shall have a lien upon the crops grown or growing upon the demised premises for the rent thereof, whether the same is payable wholly or in part in money or specific articles of property or products of the premises, or labor, and also for the faithful performance of the terms of the lease. Such lien shall continue for the period of six months after the expiration of the term for which the premises were demised."

The sections quoted relate to distinct and separate subjects and bear no necessary relation to each other.

By section 29 a landlord is authorized to distrain for rent only, and by section 31 a landlord is given a lien upon crops grown or growing for rent, and for the faithful performance by the tenant of the terms of the lease. The lien created by section 31 is not enforceable by distress.

By the terms of the lease in this case, the only agreement as to rent is, that appellee shall deliver to appellant, threshed or shelled and free of expense, one-half of all grain, and pay \$81 for the pasture land. The covenants above enumerated, and here involved, are not to be performed, in any sense as rent, but are simply such covenants as are usually imposed upon a tenant of farm lands to insure good husbandry.

It has been uniformly held in this State, that distress will only lie for rent fixed and certain, and is not available as a remedy to recover damages for the breach of general

covenants in a lease. *Marr v. Ray*, 151 Ill. 340; *Craig v. Merime*, 16 Ill. App. 214; *Tanton v. Boomgaarden*, 89 Ill. App. 500.

It is contended by appellant, that notwithstanding he may not have been authorized to distrain for a breach of the covenants mentioned, yet appellee having been served with process and having pleaded to the merits, he was entitled to a general judgment against appellee for what might be shown to be due him, and *Wiemerslage v. Zulk*, 91 Ill. App. 574, is cited in support of such contention. We are clearly of opinion that appellant is precluded, by the statement of his counsel to the court and the withdrawal from the consideration of the jury of the evidence of the amount of corn due as rent, from now urging such contention. The trial court was justified, by such statement and action of appellant's counsel, in concluding that the only questions presented for his determination, were whether the covenants mentioned could be treated as rent and whether distress was a proper remedy for a breach of such covenants. Appellant rested his case solely upon the determination of those questions and must abide the result. A party may not upon appeal, shift his position so as to gain a point, which, by necessary implication, was expressly waived in the trial court. The judgment is affirmed.

Affirmed.

Oscar Helbig v. Citizens Insurance Company.

1. INSURANCE POLICY—*what establishes prima facie case upon.* A *prima facie* case upon a policy of insurance is established by the introduction of such policy and the proofs of loss.

2. INSURANCE POLICY—*presumption as to acceptance of.* In the absence of proof, the presumption is that the insured accepted the policy delivered to him.

8. INSURANCE POLICY—*when execution and delivery of, admitted.* In the absence of a verified plea denying the execution of the insurance policy in suit, or of a verification of the general issue, an insurance company must be held to have admitted the execution and delivery of such policy and that it went into effect at the time of such delivery.

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4. **INSURANCE POLICY**—*what provision of, may be waived.* A provision of an insurance policy providing that authority to cancel must be in writing, may be waived by the insured.

5. **PREMIUM**—*when insurance company estopped to deny payment of.* In the absence of fraud, an insurance company is estopped to prove, for the purpose of avoiding the policy, that the premium acknowledged therein to have been paid, was not, in fact, paid.

6. **PREMIUM**—*when proof of non-payment of, competent.* Notwithstanding the acknowledgment of payment in the policy, such proof may be competent upon the questions, in connection with other evidence, as tending to show that the insured refused to accept the policy, or as tending to prove its cancellation.

7. **INTERESTED WITNESS**—*when competent to testify to dealings with deceased agent.* A party in interest is competent to testify to a "transaction" with a deceased agent of defendant, such as payment made to him.

8. **AGENT**—*when admissions of, incompetent.* Admissions by an agent with respect to a past transaction and which do not form a part of the *res gestæ*, are incompetent and do not bind his principal.

9. **IMPEACHMENT**—*when right of, waived.* Where a party to avoid a continuance has admitted that an absent witness would, if present, testify to the particular matters set up in an affidavit for a continuance, he has thereby waived his right to impeach such witness by a method which required him to lay a foundation therefor.

Action of assumpsit. Error to the Circuit Court of McLean County; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the May term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

PEIRCE & PEIRCE, for plaintiff in error.

BARRY & MORRISSEY, for defendant in error.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

This is an action in assumpsit by plaintiff in error against defendant in error, to recover the amount of a policy of insurance, upon furniture, etc., in the Phoenix Hotel in Bloomington, Illinois, totally destroyed by fire June 19, 1900. There have been three trials of the case by jury. The first resulted in a disagreement; the second, in a verdict and judgment against plaintiff in error, which was reversed by this court, upon writ of error, and the cause remanded (Helbig v. Citizens Ins. Co., 108 Ill. App. 625); and the third

likewise resulted in a verdict and judgment against plaintiff in error.

To the declaration, consisting of one special count upon the policy of insurance, defendant in error pleaded the general issue. Before the last trial, defendant in error, by leave of court, filed a special plea setting up a provision of the policy to the effect that no suit or action thereon to recover any loss or damage shall be brought unless commenced within twelve months next after the fire, and averring that the fire occurred June 19, 1900; that the suit was commenced June 18, 1901; that a final judgment was rendered June 14, 1902, from which no appeal was taken; that more than two years after the fire occurred plaintiff in error sued out a writ of error from the Appellate Court upon which the judgment of June 14, 1902, was reversed and the cause remanded; that the suing out of said writ of error was the commencement of a new suit, and that all subsequent proceedings are barred by the limitation clause in the policy. To this plea, a demurrer interposed by plaintiff in error was sustained by the court, and cross-error is assigned by defendant in error upon that ruling.

The writ of error, while a new suit, was a suit upon the record and not upon the policy, and the limitation clause in the policy cannot be held to apply. *Helbig v. Citizens Ins. Co., supra*. For the same reasons, the motion by defendant in error to dismiss the writ of error in this court, must be denied.

Error is assigned upon the action of the trial court in holding an affidavit for a continuance of the cause, because of the absence of a material witness, to be sufficient, by reason of which, plaintiff in error to avoid a continuance, admitted that the witness, if present, would testify to the matters averred in the affidavit. As the judgment in this case must be reversed and the cause remanded for another trial, for the errors hereinafter mentioned, we deem it unnecessary to discuss and determine the question raised by that assignment of error.

Upon the trial, plaintiff in error introduced in evidence

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the policy of insurance and also offered in evidence his proofs of loss thereunder. Upon the statement of counsel for defendant in error that it denied all liability under the policy and thereby waived proofs of loss, the court excluded the proofs of loss as unnecessarily encumbering the record. Plaintiff in error then rested his case, whereupon defendant in error moved the court to give to the jury a peremptory instruction, for the reason no proof had been offered or made that plaintiff in error had paid the premium for the insurance sought to be recovered. The court having announced that such peremptory instruction would be given to the jury, plaintiff in error entered his cross-motion to re-open his case for the purpose of introducing evidence of the payment of such premium. The cross-motion was allowed and plaintiff in error proceeded to introduce such evidence.

Upon the introduction of the policy of insurance and proofs of loss, plaintiff in error made out a *prima facie* case. Ill. Fire Ins. Co. v. Stanton, 57 Ill. 354; Forehand v. Niagara Ins. Co., 58 Ill. App. 161; Merchants Nat. Ins. Co. v. Dunbar, 88 Ill. App. 574.

The language of the policy, "The Citizens Insurance Company of Missouri, in consideration of the stipulations herein named and of fifteen dollars, does insure Oscar Helbig," etc., must, in connection with proof of the delivery of the policy to plaintiff in error, be held to be an acknowledgment of the receipt of the premium, and it has been uniformly held in this State upon grounds of public policy that, in the absence of fraud, an insurance company is estopped to prove, for the purpose of avoiding the policy, that the premium acknowledged in the policy to have been paid, was not, in fact, paid. Ill. Central Ins. Co. v. Wolf, 37 Ill. 354; Teutonia Life Ins. Co. v. Anderson, 77 Ill. 384.

Defendant in error contended upon the trial that plaintiff in error refused to accept the policy of insurance and that it never became a consummated, binding contract, and in any event, that the policy was cancelled by mutual agreement of plaintiff in error and the agent of defendant in error before the loss by fire. Under the facts in this case,

if the plea of the general issue has been verified, it would be competent for defendant in error to show that plaintiff in error did not in fact pay the premium, not for the purpose of avoiding the policy, but in connection with other proof, as tending to show that plaintiff in error refused to accept the policy as a binding, consummated contract of insurance. Defendant in error could not consummate a valid contract of insurance with plaintiff in error by merely delivering to him or leaving at his place of business, a policy of insurance, in the face of the protest of plaintiff in error that he did not want such policy and his refusal to accept it. In the absence of proof to the contrary, the presumption is that the insured accepted the policy delivered to him as a binding contract of indemnity, but such presumption is liable to be overcome by proof to the contrary, if such proof is competent under the pleadings. In the absence, however, of a verified plea denying the execution of the policy of insurance, or a verification of the general issue, defendant in error must be held to admit the execution and delivery of the policy as going into effect at that time. *Firemen's Ins. Co. v. Barnsch*, 161 Ill. 629.

Proof by defendant in error of the non-payment of the premium by plaintiff in error was, however, competent in support of the right of defendant in error to cancel the policy because of such non-payment. It was attempted to be shown by plaintiff in error, as a witness in his own behalf, that he had paid the premium to Mantel, the agent of defendant in error, at the time of the delivery of the policy, but upon the objection of the defendant in error, that the said Mantel had since died and that plaintiff in error was incompetent, under the statute, to testify as a witness to any transaction with such agent, plaintiff in error was not permitted so to testify. This was error. In support of the ruling, defendant in error cites *Starr & Curtis*, vol. 2, page 1836, par. 4, which is in part as follows: "In every action, suit or proceeding, a party to the same, who has contracted with an agent of the adverse party—the agent having since died—shall not be a competent witness, as to any conver-

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sation or transaction between himself and such agent," etc. It is insisted that the payment of the insurance premium to Mantel, the deceased agent of defendant in error, was a transaction within the meaning of that portion of the paragraph quoted, and plaintiff in error was therefore incompetent as a witness to show such payment. It is a sufficient answer to this contention to say, that the word "transaction" has not appeared in the section quoted, since its amendment by act approved April 24, 1899, in force July 1, 1899, Hurd's Stat., 1903, chap. 51, sec. 4, p. 935.

"Exhibits 2, 3 and 8" introduced on behalf of defendant in error were improperly admitted over the objection of plaintiff in error. They were letters written to defendant in error by its agent Mantel, long after the execution and delivery of the policy to plaintiff in error; were *ex parte* statements, no part of the *res gestæ*, and were not competent for any purpose. The question at issue was the payment of the premium to the agent of defendant in error, authorized to receive the same, and whether defendant in error received the premium, was immaterial. "Exhibit 9" was properly admitted in evidence, as it was shown to have accompanied "Exhibit C 4," offered by plaintiff in error, and was therefore competent as a part of the *res gestæ*. "Exhibit 4," being a telegram, sent June 21, 1900, from defendant in error to its agent Mantel, directing him to receive no premium on the policy in question, "which you report cancelled," and "Exhibit 7," being a certified copy of an entry appearing upon the record of defendant in error kept in its home office, designating the policy in question, "Cancelled Jan. 7, 1900," were self serving, *ex parte* statements by defendant in error, and were improperly admitted in evidence.

It is urged that the court erroneously permitted the witness Hurst, a special agent of defendant in error, to testify that he was verbally authorized to cancel and take up the policy in question, and what effort he made to find plaintiff in error to secure the policy, in pursuance to such authority, for the reason that by the terms of the policy such authority must be evidenced in writing. True, the policy provides,

that in any matter relating to the insurance thereby contracted, no person, unless duly authorized in writing, shall be deemed the agent of the insurer, but this provision was one subject to be waived by mutual consent of the parties, and there is evidence in the record tending to show that plaintiff in error by his conduct did waive it and agreed to surrender the policy to defendant in error upon the request of a person so authorized.

The court did not err in admitting the testimony of the witnesses Frank Mantel, Herman Schroeder, Henry Slaughter and Catherine Mantel. The evidence of these witnesses tended to show that plaintiff in error did not regard the policy as an executed, binding contract of indemnity; that he had refused to accept the same as such; that he had not paid the premium and had promised to surrender it to defendant in error. It is very doubtful, strictly speaking, whether upon the merits of this case under proper pleadings, a cancellation of the policy is properly involved. In that event the real issue might more properly be said to be, whether the policy ever became an executed, binding contract of insurance between the parties to it. If plaintiff in error, as the evidence tends to show, refused to accept the policy, and as a proposed party thereto repudiated it as his contract, there was no contract in existence to be cancelled.

Plaintiff in error, to avoid a continuance of the cause, having admitted that the witness August Boeker would, if present, testify to the matters stated in the affidavit, waived his right to impeach the witness by a method which required him to lay a foundation for such impeachment, and the ruling of the court upon that question was right. *C. & A. Ry. Co. v. Lammert*, 19 Ill. App. 135.

The views heretofore expressed dispose of the further questions involved in the giving, refusing and modifying of instructions, and a consideration of the instructions in detail would, therefore, involve a repetition substantially of what has been already said.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Peoria & Pekin Terminal Railway v. Albert Hoerr.

1. *PASSENGER—right of conductor to eject.* When a conductor in good faith demands of a passenger that he pay his fare or leave the train, and the passenger refuses to do either, the conductor may eject him.

2. *INSTRUCTION—must not submit to jury question of law.* An instruction which permits the jury to determine what are the *material* averments of the declaration, is erroneous as leaving to them the determination of legal questions.

3. *INSTRUCTION—when must not authorize recovery for future suffering.* An instruction which authorizes the allowance of damages for future suffering, is erroneous, where there was no evidence of suffering likely to occur beyond the date of the trial.

4. *REMARKS OF COURT—when cannot be urged as error.* Remarks of the trial court cannot be urged as error in the absence of objection thereto having been interposed.

Action of trespass for assault and battery. Appeal from the Circuit Court of Tazewell County; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the May term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

JACK, IRWIN, JACK & DANFORTH and H. C. FRINGS, for appellant.

W. A. POTTS and JESSE BLACK, JR., for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

On the 9th of February, 1903, appellant was running an electric line of cars between Peoria and Pekin in Tazewell county. The appellee lived at Armington in that county, and on the 9th of February, 1903, took passage on a car of appellant at Peoria. The fare from Peoria to South Bartonville is ten cents, from South Bartonville to Pekin is ten cents and from Peoria to Pekin is fifteen cents. Western avenue is a street near the limits of Peoria and between South Bartonville and Peoria. One conductor takes the car from its starting point in Peoria to Western avenue where he is succeeded by another who takes it to Pekin. A passenger going to Pekin or to any point between South

Bartonville and Pekin was given a blue ticket; one going only to South Bartonville received a yellow ticket. The first conductor furnishes the tickets and the second takes them up. That appellee had a ticket is not questioned; whether it was blue or yellow, to Pekin or South Bartonville, is one of the matters in controversy. At South Bartonville the conductor, asserting that appellee had given him a ticket only to that point, and appellee asserting that he had given him a ticket to Pekin and refusing to pay the extra ten cents fare from South Bartonville to Pekin, forcibly put appellee off the car.

The action is in trespass. Upon a trial by jury a verdict was rendered for appellee for the sum of \$750, and the court after overruling a motion for a new trial entered judgment upon the verdict.

The main grounds urged for a reversal of the judgment, are that the verdict is against the manifest weight of the evidence and that the court erred in giving and modifying certain instructions.

The law applicable to cases of this character is stated in *C., B. & Q. R. R. Co. v. Griffin*, 68 Ill., 499; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125; *Pennsylvania R. R. Co. v. Connell*, 112 Ill. 295, and *Kiley v. Chicago City Ry. Co.*, 189 Ill. 384. When a conductor in good faith demands of a passenger that he pay fare or leave the train, and the passenger refuses to do either, the conductor may eject him, and if such ejection was wrongful the passenger may recover "such damages as he sustained on account of the delay occasioned by the expulsion and all additional expense necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train." Whether such ejection be rightful or wrongful, if more force be used by the conductor than is necessary, and in consequence thereof the passenger is injured, he may recover damages for such injury. If, however, the injury to the passenger is the result of his own forcible resistance or his invitation to a conflict, he may not recover for an injury thereby occasioned.

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In the Connell case it was said : "The conductor must have the supervision and control of his train, and a demand on his part for fare should be obeyed or the passenger should in a peaceable manner leave the train and seek redress in the courts, where he will find a complete remedy for every indignity offered and for all damages sustained."

In the case at bar there is evidence tending to show that appellee had purchased at Peoria, and handed to the conductor, a ticket good from Peoria to Pekin; that appellee was wrongfully ejected from the car; that the conductor used more force than was necessary in ejecting him and that appellee suffered personal injuries in consequence thereof. There is also evidence tending to show that appellee forcibly resisted the conductor and invited a conflict when threatened with expulsion.

If the record was free from error in other respects, we would not be justified in reversing the judgment upon the ground that the verdict of the jury upon the issues of fact involved was against the manifest weight of the evidence.

By the first instruction given on behalf of appellee the jury were left to determine the material averments of the declaration. The instruction is erroneous, as submitting to the jury a question of law. The fifth instruction given at the request of appellee told the jury, that in arriving at the amount of damages to be awarded appellee, they might consider the suffering he had sustained "or will sustain by reason of such injuries." The instruction is erroneous because it is not based upon any evidence in the case. There is no evidence that appellee was still suffering from his injury at the time of the trial, but on the contrary the evidence shows that he only suffered from the injury for the period of four or five months after it occurred. The seventh instruction given at the request of appellee merely defined exemplary damages, and when read in connection with the sixth given instruction, is not subject to the criticism urged. It might more properly, however, have been made a part of the sixth instruction.

The twenty-fourth instruction offered on behalf of appel-

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lant and refused by the court as offered, is as follows: "If the jury believe from the evidence that, after being requested to pay additional fare from South Bartonville to Pekin or leave the car of defendant company, the plaintiff refused to do either, and thereupon invited a conflict, you are instructed that if the conductor thereupon did eject the plaintiff, using no more force than was necessary to eject him, the defendant Railway Company are not liable for any damages resulting from such ejection." The court modified the instruction by adding the words, "unless said plaintiff was ticketed from Western avenue to Pekin," and gave it as so modified. The instruction was erroneous as offered and was also erroneous as modified and given. As offered it authorized the jury to find appellant not guilty even though appellee had a ticket from Peoria to Pekin and was, therefore, wrongfully ejected from the car. In such case appellee was certainly entitled to recover damages for the indignity put upon him by being compelled to leave the car, and was also entitled to recover the amount of his fare from South Bartonville to Pekin. As modified and given it was erroneous, because it was calculated to and probably did lead the jury, upon finding that appellee was ticketed from Peoria to Pekin, to award him full damages for all injuries sustained, even though such injuries were the result of a conflict with the conductor, invited by appellee.

Upon the trial, counsel for appellant objected to a question put to one of appellee's witnesses, and the court in passing upon and overruling the objection made some remarks which it is insisted were prejudicial to appellant. Two answers may be made to this insistence: first, no objection or exception was made or taken to the remarks; and second, there was no impropriety in the remarks.

For the error in instructions the judgment will be reversed and the cause remanded.

Reversed and remanded.

Harry M. Tabler v. James M. Yaple.

1. **ABSTRACT**—*when insufficient, authorizes affirmance.* Where the abstract is not in compliance with the rule, the court is justified in ordering an affirmance.

Bill to foreclose. Appeal from the Circuit Court of McDonough County; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

T. Z. CREEL, for appellant.

SHERMAN, TUNNICLIFF & GUMBART, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

This is a bill filed by appellee against appellant to foreclose a mortgage given to secure one principal note for \$1,000 and five interest notes for \$60 each. The answer of appellant alleges payment by him of the notes before maturity, to one Henry C. Agnew, the authorized agent of appellee, and the important questions involved upon the hearing, were whether payment was in fact made to said Agnew, and if made whether said Agnew was authorized to collect the said notes, or any of them, before maturity.

We are advised by the briefs and arguments of counsel for the respective parties that the chancellor sustained exceptions to the report of a special master finding that the notes involved had been paid and that appellee was not entitled to a decree of foreclosure, and entered a decree foreclosing the mortgage, but the abstract of the record filed by appellant, gives us no information upon the subject, other than such as may be obtained from the following excerpts: "Exceptions taken by complainant to report by special master;" "Decree." The assignment of errors relied upon by appellant for a reversal of the decree, is abstracted thus: "Assignment of Errors."

Whether Henry C. Agnew was the agent of appellee authorized to collect notes before maturity, appears to have

been sharply controverted, and it is apparent that a course of dealing between Agnew and appellee, as evidenced by certain letters, reports and checks, was relied upon by both parties as determining that issue. Twenty-three exhibits offered in evidence by appellee, appear in the abstract as follows: "Defendant here offered the following exhibits, marked defendant's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23. Exhibits objected to by plaintiff." Eighty-four exhibits, consisting of certain letters, checks, receipts and reports and a power of attorney, are not abstracted, but merely indexed.

The abstract does not comply with the rules of this court, and we cannot determine therefrom what errors are assigned or whether there was error in the court below. The decree is therefore affirmed.

Affirmed.

Judson Nichols, et al., v. The Village of Sadorus, et al.

1. JOINDER OF COMPLAINANTS—*when proper*. Parties owning different pieces of real estate in severalty may properly join together as complainants to obtain an injunction against a municipality on account of the same injury and for the same ground.

2. SPECIAL INJURY—*when property owner suffers*. A property owner having property abutting upon a public street and whose right of ingress to and egress from such property is obstructed in such street, sustains a special injury different from that suffered by the public at large.

3. INJUNCTION—*when lies against municipality*. An injunction lies against a municipality to enjoin the removal by it of a brick sidewalk where it appears that to permit the performance of such act would be to allow a breach of trust and an abuse of a power sought to be exercised in bad faith to the wanton injury of the rights and property of individuals.

Bill for injunction. Appeal from the Circuit Court of Champaign County; the Hon. W. C. JOHNS, Judge, presiding. Heard in this court at the May term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

MANFORD SAVAGE, for appellants.

Nichols v. Village of Sadorus.

CUNNINGHAM & BOGGS, for appellees.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Appellants, owners in severalty of certain lots in the village of Sadorus, improved and occupied for residence and business purposes, filed their bill in equity to enjoin and restrain appellees, the village of Sadorus and its board of trustees and street commissioner, from taking up and removing a certain brick sidewalk constructed by authority of said village in front of said lots. To the bill as amended, a general and special demurrer was sustained by the court, and appellants electing to abide by their bill a decree was entered dismissing the same for want of equity.

The bill alleges that on and prior to June 4, 1900, there were constructed and maintained in front of the lots described, good board sidewalks; that on said date, the village board of trustees passed an ordinance, providing for the construction by special taxation of brick sidewalks in lieu of said board sidewalks; that the tax, levied by virtue of said ordinance, against the property of appellants, was returned as delinquent, and upon application for judgment therefor, appellants, with others, filed their objections thereto, which objections were sustained by the court and the said ordinance declared illegal and void. The bill further alleges that on January 16, 1903, the board of trustees of said village passed a resolution, wherein, after reciting that appellants had refused to pay the amount of an assessment made by the village in pursuance of an ordinance providing for the construction of brick sidewalks and had defeated an application for judgment therefor, that the parties who furnished the materials entering into the construction of said walks were yet unpaid and that there was no money in the village treasury to pay them, the street commissioner was instructed to remove the brick, sand and other material used in the construction of said walk to some convenient place for the purpose of being returned to the parties from whom the same was purchased.

It is further alleged in the bill, that the village board has made no provision for replacing the brick sidewalks proposed to be torn up; that said walks are in good state of repair, in constant and necessary use by the public and by appellants as the only means of ingress to and egress from the property owned and occupied by them; and that the parties from whom the materials used in the construction of said sidewalks was purchased have, in fact, been paid in full therefor by the village board. It is further alleged in the bill that the resolution in question was adopted and is threatened to be enforced in pursuance of an intention upon the part of the village board, wantonly to oppress and harass appellants and to compel them to pay an exorbitant and illegal special tax assessed and levied by virtue of an ordinance which has been declared void by a court of competent jurisdiction.

It is not claimed by appellees that the passage of the resolution and its threatened enforcement, is a legitimate exercise of the powers vested in the village board, but it is insisted in support of the ruling of the court in sustaining the demurrer to the bill, that appellants have no such common interest in the subject-matter of the bill, as authorizes their joinder as parties complainant; that it does not appear from the allegations of the bill that appellants will sustain any special damage or injury, other than such as will be sustained by the general public, except as it may be in degree, and that appellants have an adequate remedy at law.

While appellants are the owners in severalty of the property described, they are seeking relief against the same injury upon the same ground, and are, therefore, properly joined as complainants. *Mt. C., C. & R. R. Co. v. Blanchard*, 54 Ill. 240; *Hickey v. C. & W. Ind. R. R. Co.*, 6 Ill. App. 172.

A property owner having property abutting upon a public street and whose right of ingress to and egress from such property, is obstructed in such street, sustains a special injury different from that sustained by the public. This doctrine is clearly recognized in *Stack v. City of East St. Louis*,

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85 Ill. 377, and Village of Winnetka v. Clifford, 201 Ill. 475. In Brakken v. Minneapolis Ry. Co., 29 Minn. 41, it is said: "It may not be very important to the general public whether they shall be able to get to the private property of an individual, but it is important to the individual whether he should be able to get to and from his residence or business, and whether the public have means of getting there for social or business purposes. If there be an obstruction in the street in front of or near his abutting property, so as to prevent access to it, the damage which he sustains is different, not merely in degree, but in kind, from that experienced in common with other citizens; and he may maintain a private action for a special injury to him, notwithstanding there is also a remedy in behalf of the public."

In High on Injunctions (3rd ed. sec. 816), it is said: "The remedy by injunction is the most efficient means of preventing obstructions to public highways, and where the facts are easy of ascertainment and the rights resulting therefrom are free from doubt the relief will be granted at the suit of a citizen having an immediate and special interest in the matter, and the owner of a lot abutting upon a street sustains such a special injury, different than that sustained by the public, as to entitle him to maintain an action to restrain the unauthorized obstruction of the street in front of his premises."

The case at bar is clearly distinguishable from City of Chicago v. Union Building Association, 102 Ill. 398; Guttery v. Glenn, 201 Ill. 275; and Seager v. Kankakee County, 102 Ill. 669, cited by appellees.

The absence of a sidewalk and the excavation necessarily made in removing the materials used in the construction of the existing sidewalk immediately in front of appellants' property, would result in a continuing injury and damage to each of the appellants, in the use and occupancy by them of such property for residence and business purposes, and we are of opinion that their remedy at law for the damage thereby sustained is not adequate and complete.

The jurisdiction of equity may, however, be invoked by appellants in this case, upon the ground that the adoption by the village board of the resolution and the threatened action thereunder, is in violation of a trust and an abuse of power, sought to be exercised in bad faith, to the wanton injury of the rights and property of individuals. *Carter v. City of Chicago*, 57 Ill. 283.

The criticism by appellees, in the face of the allegations of the bill and the language and apparent purpose of the resolution, that appellants have no standing in a court of equity because they do not come with clean hands, presents a striking solecism.

The demurrer should have been overruled and the decree dismissing the bill for want of equity is reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

Reversed and remanded.

Frederick H. Loellke, et al., v. W. T. Grant, et al.

1. ASSIGNMENT OF ERROR—*when deemed waived*. An assignment of error not argued is deemed waived.

2. ACTION OF DEBT—*what plea not proper in*. The plea of the general issue is improper in an action of debt.

3. NIL DICIT—*what judgment of, does not admit*. A judgment by *nil dicit* does not admit the amount of the damages.

4. ASSESSMENT OF DAMAGES—*right of defendant upon*. A defendant in default has, with respect to the assessment of damages, the right of trial by jury, the privilege of cross-examination and of introducing independent evidence upon the question of the damages sought to be recovered.

Action of debt. Appeal from the Circuit Court of Jersey County; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

THOMAS F. FERNS, for appellants.

HAMILTON & HAMILTON, for appellees.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

To the declaration of appellees in an action of debt on an attachment bond, appellants pleaded, first, *nil debet*; second, *non est factum*; third, *nul tiel record*; fourth, a special plea, averring return of property attached; and fifth, a special plea, averring that the merits of the case were not tried in the action in which the bond was given; that the property was returned and that appellees were not entitled to a greater judgment than one cent. The plea of *non est factum* was withdrawn by appellants and general and special demurrers interposed by appellees to the other pleas were sustained in court. Thereafter appellants filed a plea, denominated by counsel, a plea of the general issue, together with notice of set-off. A demurrer to the last-mentioned plea was sustained, the notice of set-off was stricken from the files and judgment by *nil dicit*, was, on motion of appellees, rendered against appellants. Appellants thereupon moved the court to have the damages assessed by a jury, but the motion was overruled and the court proceeded to hear evidence as to the damages and entered a finding thereon of damages amounting to \$129.27 and rendered judgment, on such finding, against appellants, for \$450 debt, to be discharged upon the payment of \$129.27 damages and costs of suit.

While it is assigned for error that the court erred in sustaining demurrers to the pleas, no argument is attempted in support of that assignment and it must be deemed to be waived. The pleas *nil debet* and *nul tiel record*, however, were demurrable in an action of debt upon the attachment bond. *Mix v. The People*, 86 Ill. 329; *Kilgour v. Drainage Com's*, 111 Ill. 342. The so-called plea of the general issue was not appropriate to a declaration in an action of debt.

The judgment by *nil dicit* operated substantially as a judgment by default against appellants and admitted every material allegation of the declaration, but it did not admit the amount of damages. *Wanack v. The People*, 187 Ill. 116. Upon the question of the assessment of damages ap-

pellants were, upon demand, entitled to a jury and to cross-examine appellees' witnesses and to introduce evidence on their own behalf. *Pinkel v. Domestic S. M. Co.*, 89 Ill. 277; *Blizzard v. Epkens*, 103 Ill. App. 117; *Hurd's Stat.*, 1903, chap. 110, sec. 41. For the error in overruling appellants' motion to have the damages assessed by a jury, the judgment is reversed and the cause remanded.

Reversed and remanded.

Elizabeth Kroell v. John J. Kroell, Administrator.

1. **WIDOW'S AWARD**—*what does not release.* An ante-nuptial contract by which the widow has not specifically waived her award, will not operate to defeat her right thereto in the absence of a special consideration which would indicate an intention not to claim such provision.

Contest in court of probate. Appeal from the Circuit Court of Mason County; the Hon. THOMAS N. MEHAN, Judge, presiding. Heard in this court at the May term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

H. W. MASTERS & SON, for appellant.

I. R. BROWN and LYMAN LACEY, JR., for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Appellant filed her petition in the County Court asking for the appointment of appraisers to set off her widow's award in the estate of her deceased husband, John Kroell, Sr. The County Court dismissed her petition, and upon her appeal to the Circuit Court a like order was there entered.

The petition avers the necessary facts entitling appellant to an award under the statute, and proceeding, sets out an ante-nuptial contract entered into between appellant and her deceased husband, which contract she sought to have annulled upon the ground of fraud. After answer filed, it was stipulated in the court below that the allegations of

fraud should be disregarded and the cause be heard upon the petition, and determined solely upon the questions of law involved, in the same manner as if a demurrer had been interposed thereto.

On May 11, 1886, appellant, a widow, having a child or children by a former marriage, and John Kroell, Sr., a widower, having children by a former marriage, entered into an ante-nuptial contract reciting that they contemplated marriage; that each was seized in his or her own right, of real and personal property which they desired to hold separate and apart, and in consideration thereof and of \$1, each thereby released, quit-claimed and conveyed to the other all interest in the property of such other. The language of the contract, so far as it relates to the release by appellant to appellee's intestate is, "do hereby release, quit-claim and convey to said John Kroell, Sr., all interest I may acquire by virtue of such marriage in and to all his property, both real, personal and mixed, now in his possession or that he may hereafter acquire, renouncing forever all claim in law, equity or courtesy, dower, homestead, supervisorship or otherwise."

The parties to the contract were married upon the day of its execution, and lived together as husband and wife until September 9, 1903, when John Kroell, Sr., died intestate. No children were born of the marriage.

The only question presented for our determination is, does the ante-nuptial contract in question, bar appellant's right to her widow's award?

The clause in the contract by which appellee's intestate purports to release to appellant all interest in her property, employs substantially the same language as the one above quoted, and it is evident the contract was drafted by one having neither appreciation of the rights of the parties, nor ability in intelligent expression.

Although there is want of harmony in the adjudications in this State upon the question, and expressions are to be found in some of the reported cases which seem to suggest the holding of a contrary view, we think it must be re-

garded as the law in this State that an agreement between parties contemplating marriage, by which the wife, for a valuable consideration, moving to her by the terms of the agreement, or in pursuance of such agreement under the provisions of her husband's will, in lieu of her award, undertakes to release her right thereto and elects to accept the benefit of such consideration, is enforceable against her. *Zachmann v. Zachmann*, 201 Ill. 380; *Friederich v. Wombacher*, 204 Ill. 72. It is this character of contract, together with the wife's election to accept the benefit therein provided in lieu of her award, that is designated in *Zachman v. Zachman*, *supra*, an "executed contract" such as will bar the widow's right to her award.

It is the act of election by the widow, to accept the benefits accruing to her under the terms of the contract or the provisions of the will, in lieu of such statutory award, that is said to operate as a release of such award, and not the mere agreement to release, or the provision in a will in lieu thereof. This is manifestly what is intended by the court in *Friederich v. Wombacher*, *supra*, wherein it said: "Although a husband cannot, against the consent of his wife, deprive her of her statutory right to homestead and a widow's award by will or mere private contract, yet if he does by will give her money or property in lieu of those rights, and she elects to accept the same, she will be concluded by such election and acceptance."

The contract here involved was evidently intended to operate as a release by each to the other of all rights accruing to each in the property of the other by virtue of the marriage relation, which were of a reciprocal nature. The same language, in substance, is used in designating the rights released by each in the property of the other, and no intention is evident to release any distinctive or peculiar right of either in the property of the other not common to both. Appellee's intestate had no right in the property of appellant after her death, accruing to him by virtue of the marriage relation, analogous to her right to a widow's award, and there is no suggestion in the contract that the

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release of any such right was contemplated. Furthermore the contract provides no benefit to accrue to appellant from appellee's intestate, in lieu of her award, whereby she is put to an election of the acceptance of such benefit.

We hold that by the ante-nuptial contract in question, appellant did not release her right to her widow's award, and that the County and Circuit Courts were in error in dismissing her petition for the appointment of appraisers to set apart such award to her.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Emma W. Schaeffer v. James Burnett, Executor.

1. *STATUTE—how words of, construed.* Words used in a statute, are to be read in their popular, natural and ordinary sense, giving them meaning to their full extent and capacity, unless there is reason upon their face to believe that they were not intended to bear that construction.

2. *STATUTE—what not considered in determining legislative intent.* Where the language used is clear and unambiguous and there is no room for construction, no duty devolves upon courts to speculate as to the motives impelling legislative action. Whether or not a statute is productive of injustice, inconvenience, is necessary, or otherwise, are questions with which courts, as such, have no concern.

3. *WRIT OF CERTIORARI—does not lie as to courts of probate.* The Circuit Court has no jurisdiction to issue the statutory writ of *certiorari* for the purpose of bringing up for review an order or judgment of the court of probate.

GEST, J., dissenting.

Petition for statutory writ of *certiorari*. Appeal from the Circuit Court of Fulton County; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

W. E. BYERS, for appellant.

A. M. BARNETT and M. P. RICE, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a petition for a statutory writ of *certiorari* from the Circuit Court to the County Court sitting in probate, directing said court to send up the record and proceedings upon the hearing of a claim of the petitioner, appellant herein, against the estate of Matthew Beer, deceased. The claim upon hearing was disallowed, and judgment rendered against appellant, who prayed an appeal, which was allowed upon her filing bond with surety in the sum of \$400 within twenty days. Appellant undertook to procure the necessary bond and perfect the appeal, but she was unable to do so, because, as alleged in her petition, of the illness and death of her mother, who was sick during the entire twenty days, and died on the morning that period expired. Appellant then applied to the circuit judge, in vacation, for a writ of *certiorari* under the statute, to remove the case to the Circuit Court. The writ was granted and the record sent up according to the mandate thereof. In the Circuit Court, the executor, appellee herein, filed a motion to quash the writ. The court sustained the motion and quashed the writ, and gave judgment against the petitioner for costs, from which she appeals.

The leading question presented by this appeal is, whether or not the statutory writ of *certiorari* sought to be invoked by appellant, is authorized by section 3 of the statute entitled Administration, which reads as follows: "In all cases of the allowance or rejection of claims by the County Court as provided in this act, either party may take an appeal from the decision rendered, to the Circuit Court of the same county, in the same time and manner appeals are now taken from justices of the peace to the Circuit Courts, by appellant giving good and sufficient bond, with security to be approved by the county judge, and such appeals shall be tried *de novo* in the Circuit Court." Rev. Stat. 1903, page 116.

It is contended by appellant that under the foregoing section the statutory writ may issue to the County Court

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the same as to justices of the peace; that the words "same time and manner" as used in said section refer to appeals taken by *certiorari* from judgments of justices.

Paragraph 155 of the Justices and Constables Act, provides that "Appeals from judgments of justices of the peace * * * to the Circuit or County Court * * * shall be granted in all cases, except on judgments confessed. * * * The party praying for an appeal shall, within twenty days from the rendition of the judgment from which he desires to take an appeal, enter into bond with security to be approved and conditioned as hereinafter provided, in substance as follows: which bond may be filed in the office of the justice of the peace rendering such judgment, or with the clerk of the court to which the appeal is taken." * * * Rev. Stat. 1903, page 1166.

Paragraph 185 of said act, provides that "The judges of the courts to which appeal may be taken, shall have power within their respective jurisdictions, and it shall be their duty, upon petition made as hereinafter mentioned, to grant writs of *certiorari* to remove causes from before justices of the peace, into their courts, who shall endorse an order for the same upon the petition of the party praying such writ; and on producing the same to the clerk of the court, he shall issue said writ in conformity to the provisions of this act." Paragraph 186 provides that "The petition for writ of *certiorari* shall set forth and show, upon the oath of the applicant or his agent, that the judgment before the justice of the peace was not the result of negligence in the party praying such writ; that the judgment, in his opinion, is unjust and erroneous, setting forth wherein the injustice and error consists, and that it was not in the power of the party to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing." Rev. Stat. 1903, page 1175.

Appellant's contention is predicated upon the theory that at the time of the adoption of the statute upon Administration, of which the foregoing section is a part, there was

in force a general act establishing county courts, in which it was provided that "appeals may be taken from and writs of *certiorari* prosecuted upon its judgments, in the manner prescribed by law, in cases of similar judgments rendered by the Probate Court" (Laws 1849, page 62); that by the statutes of 1845, it was provided that appeals from probate justices of the peace might be taken, and writs of *certiorari* prosecuted upon their judgments, in the same manner as from judgments of justices of the peace; that section 68 of the present statute, above quoted, should be read in connection with the acts of 1845 and 1849 referred to; that the statutory writ of *certiorari* being but another mode of taking an appeal, the word "appeal" in section 68 should be held to include appeals by means of the writ of *certiorari*. It is contended that any other construction would be absurd because no reason for the repeal of a remedy once provided by statute appears, or in fact, exists; that it could not have been the object or intention of the legislature to abolish this important remedy in this kind of cases, without substituting for it something equally effective, and further that such contrary construction would frequently result in gross injustice and inconvenience.

We regard appellant's position as untenable. The legislature by omitting from the present statute, the express provision for writs of *certiorari*, must have thereby intended to abolish it as applied to probate courts. No other intention can be gathered from the act, nor can it be otherwise construed without doing violence to the general rule for construction of statutes that the words used are to be read in their popular, natural and ordinary sense, giving them a meaning to their full extent and capacity, unless there is a reason upon their face to believe that they were not intended to bear that construction.

In the construction of statutes it is within the province of courts to determine, from the words used, what was intended by the legislature, and in so doing, resort may be had to former and other existing laws; but where the language used is clear and unambiguous, and there is no room for

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construction, no duty devolves upon courts to determine or speculate as to the motives impelling legislative action. Whether or not a statute is productive of injustice, inconvenience, is necessary, or otherwise, are questions with which courts, as such, have no concern.

We are of opinion that the provisions of section 68, *supra*, are applicable to judgments of justices of the peace only, and that the Circuit Court properly quashed the writ for want of jurisdiction of either the subject-matter, or appellee, who appeared for the purpose only of questioning such jurisdiction.

The foregoing views render the remaining questions raised and argued, unimportant in this case, and it is therefore unnecessary that the same should be now discussed or determined.

The judgment of the Circuit Court will be affirmed.

Affirmed.

Mr. Justice GERT, dissenting.

William H. Mills v. Oscar Larrance.

1. VERDICT—*weight given to, where third, found by jury.* Where three juries have passed upon the issues of fact in a case, and each have found the same way, the Appellate Court will be slow to disturb the verdict.

2. VERDICT—*when not set aside as excessive.* Notwithstanding a verdict may appear to the Appellate Court to be excessive, yet where it was rendered upon a third trial upon substantially the same evidence as upon former trials, and it does not appear that another trial would be likely to result more favorably to the appellant, a new trial will not be awarded.

3. VARIANCE—*when immaterial.* A variance is immaterial which consists of an allegation that there was a balance due upon two notes and the proof showed an indebtedness upon but one.

4. VARIANCE—*when cannot be availed of.* Where a variance, if it appeared at all, existed during three trials, it cannot after the third trial be availed of as ground for reversal.

Action on the case for alleged excessive levy. Appeal from the Circuit Court of Vermilion County; the Hon. J. W. CRAIG, Judge, presid-

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ing. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

J. B. MANN and EVANS & SON, for appellant.

R. W. FISK, S. M. CLARK and BUCKINGHAM & DYSEET, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

The first trial of this cause in the Circuit Court resulted in a judgment in favor of the appellee for \$4,000, which was reversed by this court for the reason that the damages were excessive, and that the Circuit Court admitted improper evidence on the trial. Upon a second trial in the Circuit Court appellee recovered a judgment for \$3,000, which was reversed for reasons set forth in the opinion then filed, reported in 111 App. 140, which opinion, together with the former one, reported in 103 App. 356, will fully disclose the issues and the principal facts involved in the case. A third trial resulted in a verdict for appellee for \$4,000, of which \$2,500 was remitted by appellee and a judgment rendered for \$1,500, to reverse which this appeal was taken.

It is insisted that the preponderance of the evidence does not show that appellant intentionally or wantonly participated in the act of the deputy sheriff in making the alleged excessive levy, or that he knowingly ratified or approved of them; and further, that it fails to show malice, which is the gist of the action.

We have again examined and considered the evidence and are of opinion that it is sufficient to support the finding of the jury as to the facts in controversy.

Furthermore this case has been thrice tried by jury. Upon each of the trials the issues of fact involved were practically the same and the evidence adduced was substantially similar. In each instance the jury has found the issues of fact for the plaintiff, and the trial court has approved the verdict returned. As is said by the Supreme Court in *Silsbe v. Lucas*, 53 Ill. 479, "It would seem to

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be eminently proper, where three juries have found the facts in the same way, that there should be an end to the controversy as to what the facts are." See also, *Parmly v. Farrar*, 204 Ill. 38; *Hinchliff v. Rudnik*, 212 Ill. 574.

It is also insisted that inasmuch as the declaration avers that the plaintiff was indebted to the defendant in the sum of \$300, the balance due upon two notes, and the proof shows that he was in fact so indebted upon but one, there was a material variance between the averments of the declaration and the proofs. We do not regard the variance as material. Moreover the averments referred to have remained unchanged throughout the three trials of the cause, and appellant could not therefore have been surprised or otherwise prejudiced by such variance, or by the failure of the court to give the instruction offered by him relative thereto. The contention that neither count of the declaration averred an excessive levy and that the court therefore erred in admitting evidence tending to show such fact, is disposed of by what was said relative thereto in the former opinion of this court. 111 App. 140.

It is further urged that the damages are excessive. There is evidence tending to show that the wrongful acts of appellant were wilful and malicious. The jury undoubtedly so found and accordingly assessed large punitive damages. The amount of the verdict was grossly excessive. Notwithstanding the remittitur, the amount of the judgment is larger than we would sanction were this the first trial of the cause. We are satisfied, however, that a fourth trial would not, in this respect, result more favorably to appellant.

We have carefully examined and considered the rulings of the trial court upon the instructions and the admission and exclusion of evidence, urged as grounds for reversal, and find no prejudicial error therein.

The judgment of the Circuit Court is affirmed.

Affirmed.

William Smithley v. W. D. Snowden.

1. **VERDICT**—*when properly directed.* Where the evidence with all the inferences that can reasonably be drawn therefrom is insufficient to warrant a verdict, the direction of a verdict is proper.

2. **JUSTICE OF THE PEACE**—*jurisdiction of.* A justice of the peace has jurisdiction of an action on the case instituted to recover the value of a mare which was alleged to have died as the result of injuries sustained through the negligence of the defendant.

Action commenced before justice of the peace. Error to the Circuit Court of Coles County; the Hon. J. W. CRAIG, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

ANDREWS & VAUSE, for plaintiff in error.

EDWARD C. & JAMES W. CRAIG, JR., for defendant in error.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This suit was originally brought before a justice of the peace by Smithley, plaintiff in error, against Snowden, defendant in error, to recover the value of a mare which he claimed died as the result of cuts received from a barbed wire fence which Snowden had negligently permitted to be and remain out of repair and in a dangerous condition. Judgment was rendered against Snowden, whereupon he appealed to the Circuit Court, where, at the close of the evidence offered by plaintiff, the presiding judge, upon motion of defendant, directed a verdict for the defendant. A judgment was rendered against the plaintiff for costs, to reverse which he prosecutes this writ of error.

The evidence tends to disclose that Smithley placed the mare in question in the pasture of one Plummer, which adjoined Snowden's land, then occupied by a tenant, on the south; that between the pasture and Snowden's land there was a barbed wire fence, the west forty-five rods of which was built and maintained by Plummer and the remainder

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by Snowden; that after the mare was placed in the pasture she was found dead, lying partly in the water of a ravine which ran through the pasture, at a point about twenty steps from a part of the fence built and maintained by Snowden, where the posts were rotted off at the bottom and tops thereof leaning, supported by loose and sagging wires. There was some blood and hair upon the wire and posts at this point.

The evidence tends to show further, that owing to the fact that the body of the mare, when found and examined, was practically covered by water and that decomposition had set in, no critical examination was made by any one to learn the exact cause of her death, and the same does not satisfactorily appear from the evidence. It does appear however, that there were a number of deep cuts upon her neck, one of which was two or three inches deep, several small scratches on her side, and a scratched place between her front legs. The evidence tends further to show that at the place she was hurt there was a steep bank running down to the creek in the ravine, at which place the post was sound and the wires recently broken.

It will be unnecessary for us to consider the other questions raised and argued, for the reason that upon a careful review of the evidence, together with all inferences that can reasonably be drawn therefrom, we are of opinion that it is insufficient to warrant either a court or jury in finding that the mare came to her death by reason of any defect in the fence in question. We think it much more probable that she ran into the post referred to and there received the wounds she bore, and was killed through falling down the embankment, than that her death was caused by the wounds in question.

The burden was upon plaintiff to establish by the greater weight of the evidence that her death was caused by the negligence of the defendant. This, we think, he has failed to do. It follows that the trial court properly directed a verdict for the defendant.

The contention of the defendant in error, that this being

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an action on the case, neither the justice of the peace, nor the Circuit Court, on appeal, has jurisdiction of the same, is without merit. Northrup v. Smathers, 39 App. 588.

The judgment of the Circuit Court will be affirmed.

Affirmed.

**Baltimore & Ohio Southwestern Railroad Company v.
John Mullen.**

1. CARRIER—*when guilty of negligence in permitting passenger to alight.* Where the carrier through its servants and agents so acts as to mislead a passenger with reference to the time, the place and the safety of alighting, it is guilty of negligence for which a recovery will be sustained.

Action on the case for personal injuries. Appeal from the Circuit Court of Cass County; the Hon. HARRY HIGBEE, Judge, presiding. Heard in this court at the May term, 1904. Affirmed. Opinion filed April 20, 1905.

HENRY PHILLIPS and SHUTT & GRAHAM, for appellant;
EDWARD BARTON, of counsel.

MILLS & McCURE, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This suit was before this court at a former term and the judgment then appealed from was reversed because of errors in the instructions. (108 App. 637.) Upon remandment the cause was again tried, resulting in a judgment for the plaintiff for \$1,730. The second trial was had upon the second and third counts of the declaration only, which charge, in substance, that the defendant had negligent and incompetent servants in charge of its train from St. Louis to Flora, Illinois; that said servants opened the vestibule doors of the coach in which plaintiff was riding and called the station of Flora; that plaintiff then went out on the vestibule platform; that the conductor and brakeman were there and one of them informed him the depot was "right

there," indicating a point directly opposite where the train then was, and thus induced in his mind the belief that the train had stopped at the station; that it was in the night time and so dark plaintiff could not distinguish any object, and by means of the false information thus given him by the conductor or brakeman, he was induced to believe, and did believe, that the train had stopped; that he attempted to alight from said train, but that it was not at the place indicated, and had not stopped as plaintiff had been erroneously led to believe, and in attempting to alight he was drawn under the wheels and injured.

On the morning of the accident, which occurred at about 4:35 o'clock, appellee, a farmer, about 68 years of age, was a passenger upon one of appellant's trains for the purpose of being carried from East St. Louis to Flora, Illinois, where he intended changing cars to another branch of appellant's road. He testifies that when the conductor took up his ticket he informed the conductor that he had had but little sleep for two nights, and asked to be waked at Flora; that as the train neared Flora, the brakeman came into the car and called the name of the station, whereupon appellee awoke, arose, put on his overcoat, took his lunch basket on his arm, and went to the rear platform of the coach; that the conductor and brakeman were standing on the platform of the adjoining coach; that the vestibule doors were open; that he asked them where the depot was, and that one of them replied, "Right there," and pointed to the place where he afterwards got off; that said answer, and the fact that he did not feel the motion of the train, led him to believe that the train had stopped; that it was so dark he was unable to see whether or not it had; that he then stepped off, holding on to the railing as he did so, and was thrown under the wheels of the car. After appellee's wounds were dressed, the agent of appellant procured from him a written statement as to how the accident occurred, which was introduced in evidence by appellant, and tends to corroborate appellee's testimony.

The evidence also shows that when the train approached

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Flora from the west, it first stopped at a point about 200 feet west of the crossing of the track of the main line of the road with that of what was called the Springfield division running north and south, and then proceeded to the depot, which was located east of the crossing, in the angle formed by the main and Springfield tracks, at the rate of not to exceed five miles an hour. After the accident appellee was found lying near the main track about forty feet west of the crossing. His hand was injured to such an extent that amputation was necessary. The conductor and brakeman both deny that they were at the place where appellee testifies they were when the accident occurred, or that either of them made any statement to him as to the location of the depot, or that they saw him get off. The brakeman admits that he awoke appellee before the train stopped for the crossing, and told him that the train was approaching Flora, and that appellee then got up, stepped into the aisle and put on his overcoat, but denies that he saw him on the train thereafter, or that he called the station until after making the stop at the crossing. The evidence tends to show that there were a number of electric and other lights burning at and within the depot and other buildings in the vicinity of where the accident occurred, and that there were gas lights burning in the vestibule through which appellee left the car.

It is contended that appellee was guilty of contributory negligence, as a matter of law, in getting off the moving train, under the circumstances, and that the verdict rendered is contrary to and not justified by the evidence.

Although appellee's version of what was said and done by either the conductor or brakeman immediately prior to the accident, is flatly contradicted by them both, the jury, who were the sole judges of the credibility of the witnesses, and the credit to be given to their testimony, evidently believed the testimony of appellee and disbelieved that of the conductor and brakeman. Assuming appellee's testimony to be true, we are of opinion that the conductor or the brakeman in calling the station before the stop was

made for the crossing, and the opening of the vestibule, followed by the misleading statement and direction by one of the trainmen, whose duty it was to advise and direct passengers as to the safe and proper place, time and manner of alighting, as the occasion may require, together with the fact that the train was moving so slowly as to create no perceptible jar, were sufficient to induce an ordinarily prudent and careful person to believe that the train had stopped and that he might alight therefrom with safety. Furthermore, appellee was of advanced years and weary from continuous travel and loss of sleep. He was totally unfamiliar with the surroundings, and had necessarily to rely largely upon the information, suggestions or directions of those in charge of the train. The question of contributory negligence was properly submitted to the jury as one of fact for their determination, and we are unable to say that their finding thereon was not warranted by the evidence.

Counsel for appellant have cited in their brief a number of cases in which it is held that where a person attempts to alight from a train, knowing the same to be in motion, he is guilty of contributory negligence, as a matter of law. In the case at bar appellee testified that he supposed the train had stopped at the time he got off, and we think that such belief was reasonable under the circumstances. The cases cited have, therefore, no application.

We are further of opinion that the evidence justified the jury in finding that appellant was guilty of the negligence charged in the second and third counts of the declaration. It was the duty of the conductor and brakeman to look after the safety, welfare and comfort of all passengers within their care and charge. Their acts and conduct above detailed, fell far short of that high degree of care which was due to appellee as a passenger. In the exercise of due care they should have surmised from the conduct and inquiry of appellee, that he was under the impression, that the train had stopped at the depot, and that he might then safely alight. Instead of advising him to the contrary

they permitted him, without warning or hindrance, to act upon such erroneous belief.

It is urged that the judgment should be reversed because of improper remarks of counsel for appellee in their opening statement and closing argument. While a number of the remarks referred to were more or less objectionable and improper, we do not think they were so serious as to have affected the verdict. Objections to most of them were sustained by the trial judge, who afterward approved the verdict.

It is complained that the court erred in giving certain instructions offered by appellee, and in modifying one offered by appellant. We have examined the instructions referred to, and are of opinion that there is no serious error in the rulings of the court thereon.

The judgment of the Circuit Court will be affirmed.

Affirmed.

**John C. Hesley, Administrator, v. Henry T. Shaw,
et al.**

1. **STATUTE OF LIMITATIONS—*applied in equity.*** Where a cause of action is barred at law, it is likewise, as a general proposition, barred in a forum where equitable principles are applied.

2. **STATUTE OF LIMITATIONS—*when bars action on notes.*** An administrator cannot by petition or otherwise in the court of probate obtain an order authorizing the setting off of an amount due upon notes given by distributees to the deceased in his lifetime from the distributive shares respectively of the makers of such notes where the same are barred by limitation.

Contest in court of probate. Appeal from the Circuit Court of Pike County; the Hon. HARRY HIGBEE, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

A. CLAY WILLIAMS and GEORGE C. WEAVER, for appellant.

WILLIAMS & GROTE, for appellees.

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MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an appeal from an order of the Circuit Court of Pike County, where the cause was taken by appeal from the County Court, sitting in probate, denying the prayer of a petition filed by appellant, as administrator of the estate of Elizabeth Shaw, deceased.

The petition in question, after stating that the petitioner had in his hands as administrator, the sum of \$5,000, which he was ready to distribute among the heirs of said Elizabeth Shaw, namely, Henry T. Shaw, Hardin J. Shaw, Lucy A. Ellis, Fred Shaw and Charles R. Shaw, further states that the following described notes, payable to the order of said Elizabeth Shaw, were turned over and held by him as assets of said estate, to wit, one note bearing date June 12, 1886, for the sum of \$150, due one day after date; one note bearing date September 28, 1886, for the sum of \$100, due one day after date; and one note bearing date January 11, 1887, for the sum of \$200, due one year after date, all of which were executed by the said Henry T. Shaw. Also one note bearing date March 7, 1887, for the sum of \$100, due six months after date, executed by the said Hardin T. Shaw; and also one note bearing date March 5, 1890, for the sum of \$229, due one day after date, executed by the said Lucy A. Ellis. The petition then prays that an order be entered authorizing and directing the petitioner to make distribution of the said sum of \$5,000 among the heirs of said Elizabeth Shaw, share and share alike, and that he be further authorized to apply so much of the respective distributive shares of the said Henry T. Shaw, Hardin J. Shaw and Lucy A. Ellis, as was necessary in payment of the amounts due on their respective notes, and then to cancel and deliver the same to the makers. To the petition the makers of the said notes filed their answer in the nature of a demurrer, alleging that the right of action upon said notes accrued more than ten years prior to the death of said Elizabeth Shaw; that the same were barred by the Statute of Limitations; and that the Probate Court had no

power to adjudicate the rights and liabilities of the parties in respect to said notes, nor to determine the validity of the same. The court held that the notes were barred by the Statute of Limitations, and ordered the administrator to distribute the said sum of \$5,000 to the heirs in equal proportions, from which order the petitioner appeals.

Appellees contend that the notes were barred by the Statute of Limitations, and that the administrator had no right either at law or in equity to take them into account in making distribution.

Appellant admits that if the filing of the petition be, in effect, the institution of an "action" on the notes within the meaning of the word, as used in section 16, chapter 83 of the Statute of Limitations, he has no standing in court, and further, that if an "action" at law were commenced to collect the notes and the defense of the Statute of Limitations interposed, it would be effective. He contends, however, that notwithstanding the right of action at law to enforce payment of the notes, was barred by statute, inasmuch as they were still due and owing, the moral and equitable obligation to pay them remained; that the present proceeding, being in its nature of an equitable character, equitable rules and principles should be applied and the payment of the notes enforced by the Probate Court, in the exercise of its equitable jurisdiction and powers in the settlement of estates. In support of such contention the cases of *Holmes v. McPheeters*, 149 Ind. 587, and *Tinkham v. Smith*, 56 Vt. 187, are chiefly relied upon. In the *Holmes* case, which involved questions similar to those at bar, the court, *inter alia*, says: "The doctrine is correctly and firmly settled in this State that a distributee is not entitled to receive his distributive share while he is indebted to the estate, and thereby retain in his own hands a part of the fund out of which his own and the shares of other distributees, or other claims on such fund, ought to be paid.

"* * * This right is not one of set-off, but is founded on the principle that the administrator or executor has an equitable lien on the share of the distributee or legatee,

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until the latter has discharged the obligation which he owes to the estate. The heir or legatee, as the authorities affirm, is not, in accordance with justice or good conscience, entitled to be awarded and receive his share as long as he is a debtor to the estate, and thereby has in his own hands, a part of the fund upon which the payment of his own share and the shares of others depend. To allow a distributee to receive his share of the fund in the hands of the administrator for distribution, while the former is in default in the payment and discharge of his own obligations to the estate, would serve to diminish the fund, and result, perhaps, to the prejudice of others. By permitting the distributee to receive his share, while he retains a part of the funds in his own hands, out of which his share ought to be paid, might and frequently would result in awarding to him a portion of the fund greater than that received by other equally entitled distributees. These principles, in reason, *do* and *must apply* when the recovery of the debt which the distributee owes to the estate is barred by the Statute of Limitations. The Statute of Limitations is one of repose, and is only a bar to the remedy, and not to the debt itself, simply leaving it unpaid without any legal remedy on the part of the creditor to enforce its payment by suit, in the event the debtor relies on the statute as a defense. Measured, however, by a moral standard, and one in accordance with good conscience, the debtor is still under an obligation to pay his debt, although a recovery thereon under the law may be barred by the lapse of time. The statutes of this State recognize the right of a party to enforce a set-off against a cause of action, although a recovery upon the debt upon which the set-off is based is barred by limitation. * * * It must follow, in our judgment, that the Statute of Limitations could not be successfully interposed by appellant as a defense to defeat the appellee in his *equitable* right to apply an amount sufficient of the appellant's share of the estate in his hands in payment of the note."

In the case of Tinkham v. Smith, *supra*, the action was founded on a decree or order of distribution of the estate

of Henry Tinkham made by the Probate Court, by which the defendant as administrator was ordered to pay the plaintiff, heir-at-law of the intestate, out of the estate the sum of \$1,126.22; and it was there said: "The decree of distribution is more in the nature of an order upon the administrator to account to the heirs, for the several sums named in the decree, than of an adjudication that the administrator is indebted to each heir in the sum named in the decree. It is not in the nature of a personal judgment against the administrator in favor of each; but rather that he has a fund in his control belonging to the estate, for which he is to account to the several heirs in the sums named in the decree as belonging to the heirs respectively. When part of the fund consists of a debt due the estate from an heir, the administrator may rightfully say to such heir, 'I account to you by applying the debt due from you to the fund, in part satisfaction of that part of the sum decreed to you.' Such would be a lawful accounting to the extent of the indebtedness. But when the administrator asserts such indebtedness, and its application, he takes the burden of proving the existence of the indebtedness. As such assertion, by way of plea in bar, or satisfaction of the decree of distribution, is not in form an *action* to enforce the payment of such indebtedness, a replication of the Statute of Limitations is not applicable thereto. The Statute of Limitations applies only to *actions*, and not to pleas in bar, by payment or satisfaction; and probably not to pleas, as such, unless in the nature of an action, like declarations in set-off. Although many of the cases cited by defendant's counsel are suits in equity, they all sustain his contention that an administrator has the right to apply the indebtedness from an heir to the estate, in part or whole satisfaction of the share of such heir in the estate; and that the Statute of Limitations does not bar, nor apply, to such application, as it bars and applies to *actions* only."

Woerner on American Law of Administration is also cited. It is therein said (section 1238): "The Statute of Limitations does not operate the extinguishment of a debt,

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but bars the remedy only; hence, such debts may be set off to legacies or distributive shares, notwithstanding the efflux of the statutory period of limitations."

The question involved has never been definitely determined by the Supreme Court of this State. In the case of *Jeffers v. Jeffers*, 139 Ill. 368, the court says: "It is undoubtedly true that where a legacy or bequest is left to the testator's debtor, the indebtedness may be taken out of the legacy, for the reason, as is said, 'the legatee's demand is in respect of the testator's assets, without which the executor is not liable, and therefore the legatee in such case is considered by a court of equity to have so much of the assets already in his hands as the debt amounts to, and consequently to be satisfied *pro tanto*.' (Toll on Executors, 338.) It has also been held that an executor's right to deduct a debt due the testator from a legacy will not be defeated by showing the debt to be barred by the Statute of Limitations." It will thus be seen that that question is still open in this State.

Appellees admit that it has been held in some jurisdictions that the amount of a debt barred by the Statute of Limitations, due from a legatee, may be deducted from the legacy, but insists that such holdings are based upon the English rule, hereinafter referred to, and that a distinction exists between legacies and distributive shares. The cases of *Allen v. Edwards*, 136 Mass. 138, and *Holt v. Libby*, 80 Me. 329, and a number of other cases, are cited, which seem clearly to draw such distinction.

In the *Allen* case, notwithstanding the statute of Massachusetts provides that an administrator or executor may retain and appropriate the funds in his hands to the payment of indebtedness due from the distributee or legatee, the court held that it could not be done where the debt was barred by the Statute of Limitations. The court reviews the English rule and the case of *Courtenay v. Williams*, 3 Hare, 539, and says: "There is but slight force in the argument when we observe the difference which exists under our law in regard to legacies. In England no action

at law can be maintained for a legacy, and the courts of equity have always assumed the right to impose the terms on which the beneficiary shall receive it. Lord Kenyon, in refusing to entertain an action at law for a legacy, says: 'If an action will lie for a legacy, no terms can be imposed on the party who is entitled to recover, and therefore when the legacy is given to a wife the husband would recover at law, and no provision could be made for the wife or family; whereas, a court of equity will take care to make some provision for the wife in such a case. But the whole of this admirable system, which has been founded in a court of equity, will fall to the ground if a court of law can enforce payment of a legacy.' * * * 'In a court of law, we cannot impose any terms on the party suing; if he be entitled to a verdict, the law must take its course. But a court of equity will impose on the party applying such terms as they think right and according to conscience.' The case of *Courtenay v. Williams*, and other cases cited, proceed on the ground that a legacy is not a debt, that when the estate of the deceased has claims against the legatee no case of mutual debts is presented, as there is something due as such from the legatee, while nothing is thus due from the other. But a different view of a legacy has been taken here. As we have heretofore seen, for many years an action at common law might be maintained to recover it, and actions of assumpsit or contract have been repeatedly so maintained."

In the case of *Holt*, *supra*, the court distinguishes between the rule in England and the States and also differentiates the rule as to legacies and of distribution. It says: "It is a general rule in the settlement of legacies by an executor that he may retain the legacy, the whole or a sufficient portion, in satisfaction of the legatee's debt to the estate, if the testator does not indicate, either in the terms of the bequest or in any other parts of the will, that it shall be otherwise. This is the rule both in law and in equity. The English practice goes further, and allows the rule to prevail, on the idea of a lien, as to debts which have

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become barred by the Statute of Limitations. The leading case maintaining the English rule seems to be *Courtenay v. Williams*, 3 Hare, 539. Subsequent English cases follow in the same line. One or two of the American state courts may have practiced on the English rule. But a legacy was recoverable in England, in the day of the authorities cited, only in chancery. The same rule of equitable set-off prevails in that country, not only as to legacies, but also as to the share of one entitled as next of kin in the estate of an intestate. This doctrine cannot be applicable in this State, and in most of the States, where a legacy is made by statute, if not by ancient practice, a legal claim. With us it is a distinct and independent legal claim. The estate is just as much a debtor to the indebted legatee as the legatee is to the estate. Each has a legal right and remedy. And a statute-barred debt is no more recoverable by an estate than by any other creditor."

No reason is urged why the English rule should not apply in Illinois, nor has our attention been called to any statute or adjudication by which either a legacy or a distributive share in an estate, is made, or has been held to be, recoverable, except by a suit in equity or through the medium of the Probate Court. The only method provided by statute for the recovery of legacies by a suit at law, is that authorized by section 120 of the Administration Act, which provides that any legatee may, after the Probate Court shall order the same paid, maintain an action of account, against a delinquent executor, to recover his part of the estate in such executor's hands. *Mahar v. O'Hara*, 4 Gilm. 425. Until a valid order of distribution is made, an administrator is the trustee of the estate for the benefit of the creditors and heirs, and no cause of action accrues to the heirs until such order has been entered. *Frank v. People*, 47 App. 248, affirmed 147 Ill. 105. The payment of distributive shares in an estate cannot be enforced by an action at law, and a court of chancery will not assume jurisdiction except in an extraordinary case. *Labadie v. Hewitt*, 85 Ill. 341. The Probate Court, therefore, had exclusive ju-

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risdiction to administer the estate of Elizabeth Shaw, and in the administration thereof could probably exercise such equitable jurisdiction as is adapted to its organization and modes of proceeding. *Schlink v. Maxton*, 153 Ill. 447.

We are of opinion, however, that whether the strict rules of law, or equitable principles, are applied in the determination of the question, the notes are, in either case, barred by the Statute of Limitations. It is well settled that when courts of law and equity have concurrent jurisdiction, a claim barred at law will be barred in equity, and that even when the jurisdiction in equity is exclusive, the limitation applies if the remedy sought is analogous to a remedy at law. *Hancock v. Harper*, 86 Ill. 445.

The purpose of the petition was, and the effect of granting the same would be, to enforce the payment of the notes in question. The proceeding was, therefore, clearly analogous to an action at law for the same purpose. There is no claim that any new promise to pay the notes existed, nor that any mutual claims existed between the deceased and the makers of the notes. The trial court properly held that the Statute of Limitations, which is a statute of repose, based upon the presumption that the debt has been paid, barred not only the remedy of appellant, as the representative of his intestate, but the right, which it was intended to vindicate, as well. The deprivation of one of his remedies for enforcing a contract, is itself a mode of impairing the validity of the contract. *Board of Education v. Blodgett*, 155 Ill. 450.

The judgment of the Circuit Court is accordingly affirmed.

Affirmed.

Springfield Consolidated Railway Company v. Mary Johnson.

1. **RIGHT OF RECOVERY**—*when instruction upon, proper.* An instruction is proper which tells the jury in substance that if they should find that the plaintiff has proved her case as laid and charged in the declaration, or any count thereof, by a preponderance of the evidence, then they should find the defendant guilty.

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2. VERDICT—*when not disturbed*. A verdict will not be disturbed on appeal as against the preponderance of the evidence where such evidence is conflicting and fairly tends to prove either side of the controversy.

3. VERDICT—*when set aside*. A verdict will be set aside on appeal where it does not appear that the plaintiff has established her case by the greater weight of the evidence.

Action on the case for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

WILSON, WARREN & CHILD, for appellant.

R. H. PATTON and E. E. BONE, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an appeal by the defendant from a judgment of \$1,400 rendered by the Circuit Court in an action in case by appellee against appellant.

The declaration alleges that plaintiff boarded a street car of defendant in the city of Springfield on July 17, 1903, to go to the rolling mills north of the city; that she told the conductor to let her off at the place where the people got off to go to the rolling mills; that the car stopped at Eleventh street and Ridgley avenue, and while plaintiff was getting off, the car was suddenly started and she was thrown to the ground and thereby injured. The alleged errors relied upon for reversal are that the court erred in its rulings upon instructions, that the verdict is contrary to the manifest weight of the evidence, and that the damages rendered are excessive.

The only instruction complained of, in argument, is the first given at the request of appellee, which tells the jury that if they found that the plaintiff had proved her case as laid and charged in the declaration, or any count thereof, by a preponderance of the evidence, then they should find the defendant guilty. This instruction has been repeatedly held not to be objectionable. C. C. Ry. Co. v. Carroll, 206 Ill. 331.

Upon the question as to whether the car stopped a reasonable time to allow plaintiff to alight, the evidence is in close conflict. Plaintiff testifies that just as the car approached Eleventh street and Ridgley avenue the conductor stepped to the front end of the car, rang the bell with one hand, and motioned with the other and nodded to her to get off; that, when the car stopped she hurried to the rear end, grasped the railing of the car with her right hand and stepped down on the foot board; that as she put her foot on the ground she heard the gong of the car ring, and the car moved out from under her, pulling her around and throwing her to the ground.

One Wing, called for plaintiff, testifies that on the morning of the alleged accident, while standing nearby, he saw the car in question approach the corner; that the conductor got off; went forward about twenty-five feet to a steam railroad crossing to see if it was clear; that shortly after the conductor had gone forward, plaintiff appeared on the back platform, stepped down on the running board, then off backward just as the car started forward; that it pulled her around but did not throw her to the ground; that she then walked over to him, asked his name, and showed him her arm.

The only other witnesses to the accident were the motorman and conductor of the car in question, who were called by defendant. The conductor testified that plaintiff asked him to let her off at the rolling mills; that when he got to Eleventh street and Ridgley avenue where the C. & A. tracks cross the street railway, the motorman, as usual and without any signal from him stopped the car, while he, witness, went forward about twenty-five feet to "run the crossing;" that when he left the car plaintiff was still sitting, and he did not motion or direct her to get off; that when he signalled the motorman to go forward, plaintiff had not yet attempted to alight; that he did not know when plaintiff got off or did not hear of her being hurt until late in the afternoon.

The motorman testified that he stopped his car for the

conductor to "run" the railroad crossing, without any signal from the conductor; that it was his custom to stop and wait for the conductor to go forward and give him the signal to go ahead; that when he got the signal from the conductor to go ahead he sounded his foot gong and looked around to the rear of the car to see all was safe; that no one was attempting to alight and he then started the car forward; and that he did not learn of any accident to the plaintiff until that afternoon.

After a careful perusal and consideration of the evidence as it appears in the abstract, we are satisfied that the jury were warranted in finding that appellee was injured at the time and place and in the manner as testified to by her.

Whether it is established by the greater weight of the evidence that her injury was the result of the negligence of the conductor in failing to allow her a reasonable time in which to alight from the car, is a question not free from difficulty. The evidence is exceedingly conflicting, and upon reading "the cold words of the record" seems to preponderate in favor of appellant. The question was, however, determined by the jury in the negative. The trial judge who, as well as the jury, had a superior opportunity to judge of the credibility of the witnesses, and who had a supervisory power over the verdict, approved the finding. We are therefore constrained to hold that the verdict of the jury upon the question of negligence is not so manifestly against the weight of the evidence as to warrant a reversal of the judgment.

As to the nature, extent and probable duration of the injuries suffered by appellee as the result of the accident, the evidence is somewhat meager. The jury was, we think, warranted in finding that her shoulder was dislocated; that it was necessary to reduce the dislocation to keep her arm in "splints" for several weeks; that she was confined to her bed for about six weeks; that she became liable for medical services in the sum of \$120. She testifies that prior to the accident, and since the birth of her last child, she had suffered from no ailment, or sickness, nor

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from any womb on bladder trouble, was always able to do her work and get around; but that since the accident she has suffered such pain that she can hardly walk; cannot sit in a chair without having a cushion upon which to sit; that she has been unable to do any work. Dr. Walters, her attending physician who was called upon the day of the accident, substantially corroborates appellee's testimony as to the dislocation of her shoulder, the attendant treatment, disability and suffering. He further testifies that some ten weeks after he began treating her, he examined her womb and found that she was suffering from what is known as "cystocele, also a partial falling of the womb," but that he was unable to tell whether such condition had existed for one or for twenty years; that he knew of no authority holding that falling of the womb was due to a fall. Dr. Dixon, called for appellant, testifies that neither "falling of the womb" nor "cystocele" are ever caused by a fall or jar of the person; that they are diseases following child-birth and are caused by ill health alone; that he had never heard or known, or read of such ailment being caused by such an accident as was described by appellee.

The foregoing was all the medical or surgical testimony offered, and we think it insufficient to justify the amount of the verdict returned by the jury.

If the only injury resulting to appellee from the accident with which she claims to have met, was a dislocation of the shoulder and the consequent pain, inconvenience and expense of being cured, the damages are manifestly excessive.

We are of opinion that appellee has failed to show by the greater weight of the evidence that her present physical condition is entirely due to such accident. The judgment must therefore be reversed and remanded.

Reversed and remanded.

James Kitchin v. John E. Clark.

1. *ASSUMPSIT—what essential to recovery in action for goods sold and delivered.* In order to recover in assumpsit under the counts for goods sold and delivered, it is essential that the delivery of the goods in question be established by the greater weight of the evidence.

2. *DELIVERY—what does not establish.* The delivery of goods sold is not established by showing the loading of the same upon cars, where it appears that the seller consigned the same and caused the bill of lading to be issued to himself and did not also indorse and deliver such bill of lading to the purchaser.

Action of assumpsit. Appeal from the Circuit Court of Coles County; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

EDWARD C. & JAMES W. CRAIG, JR., for appellant.

ANDREWS & VAUSE, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a suit in assumpsit by appellee against appellant. The trial in the Circuit Court resulted in a verdict in favor of the plaintiff for \$400.96, from which the defendant appeals.

The declaration consists of the common counts. Recovery was sought thereunder for goods sold and delivered and for commissions claimed to be due plaintiff for services in purchasing corn for defendant. In February, 1903, appellant, Kitchin, who was a grain buyer at Mattoon, Illinois, bought of or through the agency of appellee, Clark, a farmer living near Fordyce, Illinois, 8,000 bushels of corn, estimated to be about ten carloads, part of which belonged to Clark and the remainder to Tucker, Madden and Davis, neighboring farmers.

Kitchin claims and so testifies that he bought the entire lot consisting of Clark's individual corn and other corn belonging to neighboring farmers, directly of Clark, who was

acting as agent for such other owners, with the understanding and agreement that it was all to be shipped and delivered by Clark to Kitchin at Baltimore, Maryland, for export; that it was to be graded and weighed at Baltimore; that it was to grade there as either No. 3 or No. 4; and that if it graded No. 3 the price to be paid was thirty-eight cents, and if No. 4, thirty-six cents per bushel. On the other hand Clark contends, and so testifies, that he sold his individual corn to Kitchin at thirty-eight cents per bushel, to be delivered on board the cars at Fordyce; that it was not to be subject to Baltimore grades or weights; that the remainder of the corn was bought by him for and at the request of Kitchin, who agreed to pay him one-fourth cent per bushel for his services; and that he was not to and did not guarantee the grade or weight at Baltimore but was simply to ship such other corn, as instructed by Kitchin. It is not, however, controverted that it was agreed that all of the corn, when loaded in the cars, was to be consigned to "John E. Clark, Baltimore, Md., notify James Kitchin;" and that Clark was thereupon to draw upon Kitchin through some bank, at the rate of thirty-six cents per bushel, attaching the bills of lading for the corn to such drafts; and that Kitchin prepared and mailed to Clark a specimen bill of lading showing how the consignments were to be made. Several matters growing out of the transaction are in controversy in this suit, only one of which we deem it necessary to now consider.

On April 8th, Clark, pursuant to said contract, shipped three cars of his own corn, for each of which he obtained a bill of lading, which, in conformity with the specimen furnished, recited that the car was consigned to Clark, at Baltimore, with directions to notify Kitchin. The cars were numbered 90,103, 16,018 and 10,347. On April 13th, Clark, sent Kitchin, by mail, bills of lading for cars numbered 90,103 and 16,018, but failed to send the one for the car numbered 10,347.

It clearly appears from the evidence that Kitchin never received the bill of lading for car 10,347 and did not know

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that such car had been loaded or shipped until May 13, 1903, when he learned from his commission men at Baltimore that the corn, not having been claimed upon its arrival, had been placed in a public elevator and afterwards sold for less than the freight and other charges.

It is sought by Clark to recover the value of the missing car of corn, under the count of the declaration for goods sold and delivered. It is contended by Kitchin that he never received the bill of lading for the missing car and that the car was never delivered to him either actually or constructively, and that therefore no recovery can be had for the value of the corn, under the count for goods sold and delivered.

“To maintain the count for goods sold and delivered, it is essential that the goods should have been delivered to the defendant or his agent, or to a third person at his request, or that something equivalent to a delivery should have occurred.” *Ward v. Taylor*, 56 Ill. 494.

In order, therefore, for Clark to recover the value of the corn in question, under the count for goods sold and delivered, it was incumbent upon him to show the delivery of the same, by the greater weight of the evidence.

“The delivery of goods bought, to a carrier, to be conveyed to the vendee, is a complete delivery to the latter, and vests the property in the goods in him.” *Ward v. Taylor, supra*. It follows that if a bill of lading for the car, properly indorsed so as to constitute a complete delivery, had been delivered by Clark to Kitchin, it would have been sufficient.

The mere loading of the corn upon the cars at Fordyce, did not, however, constitute a delivery of the same to Kitchin, for the reason that the corn was consigned, and the bills of lading issued, not to Kitchin, but to Clark himself. Such act did not divest Clark of his title to the corn. It was, in legal effect, but a delivery to the carrier as bailee for Clark, and a valid transfer of the bills of lading by Clark, before the corn actually reached the possession of Kitchin, would have passed the title of the property to such

assignee. Benjamin on Sales, sec. 399; M. C. R. Co. v. Phillips, 60 Ill. 190; W. U. R. Co. v. Wagner, 65 Ill. 197; Lewis v. Springville, 166 Ill. 311. To constitute a delivery of the corn to Kitchin it was therefore necessary that he should not only have indorsed the bills of lading to Kitchin, but have also delivered the same to him.

Clark testifies that he received the three bills of lading from the agent at the same time and mailed them all to Kitchin, but that he would not say positively that he mailed them all in one letter. Accompanying the two bills of lading, which were received by Kitchin, was a letter as follows: "You will find enclosed bill of lading for two cars. Would send sooner but thought would try to bill out the third one." Other facts and circumstances appearing in the record, which we deem it unnecessary to recite in detail, confirm us in the belief that for some reason or cause the third bill of lading was never sent nor delivered to Kitchin by mail, or otherwise, and was finally mislaid or lost while yet in the possession of Clark.

While the evidence fails to show a specific agreement to that effect, we think the jury was warranted in finding that it was the understanding of the parties that the bills of lading were to be sent by mail, and had the one in question been so sent, in accordance with such understanding, we are of opinion that it would have constituted a sufficient delivery, although the bill was lost in transit. We think, however, that the greater weight of the evidence fails to show that the bill in question was ever sent to Kitchin through the mails or that anything equivalent to a delivery occurred.

Inasmuch as the plaintiff failed to prove by the necessary degree of evidence that the corn contained in car 10,347 was ever delivered to or came into the possession of Kitchin, or any one for him, the verdict of the jury, in so far as it awarded to Clark damages for the corn in question, was erroneous and excessive.

The third instruction given at the request of appellee is palpably erroneous. It not only utterly ignores the essen-

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tial question at issue, as to whether or not the corn was delivered, but clearly assumes that there was a delivery.

The foregoing being sufficient grounds upon which to reverse the judgment, it is unnecessary to consider the various other errors assigned, a number of which we deem valid.

For the reasons indicated the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

W. T. Freeland v. Oscar Hughes.

The decision in this case is controlled by the opinion rendered in the former hearing thereof and reported in volume 109 Ill. App. 73.

Action of assumpsit. Appeal from the Circuit Court of Moultrie County; the Hon. W. C. JOHNS, Judge, presiding. Heard in this court at the November term, 1904. Reversed with finding of facts. Opinion filed April 20, 1905.

HARBAUGH & THOMPSON, for appellant.

E. J. MILLER, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a suit by appellee against appellant to recover commissions alleged to be due him for the sale of certain real estate. He recovered judgment in the Circuit Court for \$174, from which the defendant appeals.

Upon a former trial of the cause plaintiff recovered a judgment for a like sum, which, upon appeal to this court, was reversed and the cause remanded because of the giving by the trial court of an erroneous instruction. Freeland v. Hughes, 109 App. 73. We have carefully read and considered the evidence and are constrained to adhere to the conclusion as to the facts involved, expressed in our former opinion, and now hold that the greater weight of the evidence clearly establishes the fact that appellee's

authority to sell the land was revoked before the alleged sale to Wiley was finally effected. We are further of opinion that the letter from appellant to appellee, designated as "Exhibit 2" and written after such revocation, did not constitute an acceptance by the former of the latter's services in selling the land to Wiley, nor a ratification of such sale. The cause has been thrice tried in the Circuit Court and appellee has had ample opportunity to establish his alleged right of action. We have twice held that the evidence adduced by him was insufficient for that purpose. It is time that the litigation should end.

The judgment of the Circuit Court is therefore reversed without remanding.

Reversed.

Finding of facts, to be incorporated in the judgment of the court:

We find that the employment of appellee by appellant was ended and his authority to sell the land in question revoked by appellant prior to the sale of the same to Wiley; that such employment and authority were not subsequently renewed, and that the subsequent sale to Wiley was not ratified by appellant.

F. A. Cobleigh v. A. C. Spitznagle, et al.

The decision in this case is controlled by the opinion filed in Spitznagle v. Cobleigh, *post*, p. 191.

Bill in chancery. Error to the Circuit Court of Fulton County; the Hon. J. A. GRAY, Judge, presiding. Heard in this court at the May term, 1904. Affirmed. Opinion filed April 20, 1905.

DANIEL ABBOTT, for plaintiff in error.

LUCIEN GRAY, for defendants in error.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

The controlling questions involved in this case are sub-

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stantially the same as those urged and argued by counsel, and considered and determined by this court, in the case of Spitznagle v. Cobleigh, *post*, p. 191, in which an opinion was filed at the present term. Upon the dismissal by the City Court of the bill to foreclose the mortgage there involved, Cobleigh, plaintiff in error herein, filed another bill in the Circuit Court of Fulton County, against the same defendants and one Jesse Heylin. The bill after setting up the proceedings had in the City Court in the former suit, the bankruptcy of Spitznagle, the appointment of Perkins as his trustee, the sale and conveyance of the equity of redemption by said trustee to Heylin, and the failure to make said trustee a party defendant to said former suit, prays that all proceedings in the City Court, relative to the mortgage in question, be vacated and annulled, and for a foreclosure of the same. The Circuit Court on hearing decreed that the bill be dismissed for want of equity, holding that the decree of the City Court was valid and binding, and that the mortgage indebtedness was fully satisfied thereby; whereupon the complainant sued out this writ of error.

The decree of the Circuit Court is in full accord with the views expressed in Spitznagle v. Cobleigh, *supra*, and is therefore affirmed.

Affirmed.

Samuel W. McGuire, Administrator, v. Chicago & Eastern Illinois Railroad Company.

1. TRESPASSER—*when person upon right of way is.* The right of way of a railroad company is its exclusive property upon which no unauthorized person has a right to be, for any purpose, and any person who travels upon such right of way, not for any purpose of business connected with the railroad, but for his own mere convenience as a foot-way, is a wrong-doer and a trespasser.

2. TRESPASSER—*when person not.* A person traveling along, upon or across a right of way of a railroad company at the intersection of a public highway or street is not a trespasser.

3. **TRESPASSER—when person not.** A person in using a crossing as a part of the highway is not bound, in order to avoid being deemed in law or in fact, a trespasser, to pursue any angle or direction when passing over the same; he may not only pass directly over the right of way, but he may also pass from one side of the highway to the other using the right of way of the railroad company for that purpose for the entire or any part of the distance.

4. **TRESPASSER—when person is.** Where one uses the right of way of a railroad company where it is crossed by a public highway, not as a part of the public highway for travel or passage, but for his own private purposes, he thereby becomes a trespasser.

5. **TRESPASSER—duty of railroad company with respect to.** A railroad company owes no duty to a person walking along its tracks without its invitation, either express or implied, except to refrain from wantonly or wilfully injuring him, and to use reasonable care to avoid injury to him after he is discovered to be in peril. It makes no difference in that respect, whether he is a trespasser, a mere licensee, or one who is on the tracks by mere sufferance, without objection of the company.

6. **EXCESSIVE SPEED—when presumption of negligence arising from, is rebutted.** The presumption of negligence which arises from the running of a train in an incorporated city or village at a greater rate of speed than that authorized by statute, is rebutted where it appears that the plaintiff seeking to recover upon the basis of such negligence was at the time of the injury sustained a trespasser, to whom the defendant company owe no duty.

Action on the case for death caused by alleged wrongful act. Error to the Circuit Court of Vermilion County; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

WILLIAM L. CUNDIFF, for plaintiff in error.

H. M. STEELY, for defendant in error; W. H. LYFORD and E. H. SENEFF, of counsel.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This action was brought by the plaintiff in error to recover damages for the killing of his intestate by a passenger train of defendant in error, at the crossing of its railroad with a street in the incorporated village of Rossville, called Benton avenue. The declaration consisted of five original and four additional counts. The defendant

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demurred generally and specially to all the counts. The plaintiff dismissed all except the first and fourth original and the additional counts. To the remaining counts a demurrer was sustained. Plaintiff then elected to abide by the same, whereupon the court rendered judgment against him for the costs. He appeals and assigns as error the action of the court in sustaining such demurrer and entering judgment thereon.

It is averred by the several counts of the declaration that the defendant was possessed of and operating a double track railroad which ran north and south through the incorporated village of Rossville, crossing one of its streets called Benton avenue; that Benton avenue was a public street running east and west through the village, in the thickly populated part thereof, parallel with the north and south lines of the village.

The first original count charges a violation of the ordinance limiting the speed of trains to 30 miles, resulting in the killing of plaintiff's intestate while walking southward across Benton avenue, a public street, where the same was intersected by defendant's north-bound track, while unable because of the steam and smoke and noise of a passing freight train, on the south-bound track, to see or hear the approach of the passenger train by which he was killed.

The fourth count differs from the first, in charging a violation of an ordinance of the village, limiting the speed of trains to 15 miles, in case no flagman was kept at a certain other crossing, and in stating that the injury was sustained while deceased was walking upon, along and across said Benton avenue, near the said south-bound track of said public street.

The grounds for demurrer to the first and fourth counts are, in substance, that it is not shown that deceased was attempting to cross the defendant's track at a highway or street crossing; that so far as appears, deceased was a trespasser, walking longitudinally along defendant's tracks; that no facts are averred which entitle plaintiff to recover because defendant had no flagman at the crossing; that each

count is evasive and lacks certainty in not averring whether deceased was passing along the street and crossing the tracks, or passing along the tracks crossing the street.

In support of such demurrer counsel for defendant contends that it appears from the averments thereof that deceased, when injured, was a trespasser, and that therefore defendant owed him no duty, at that time and place, except to refrain from wilfully or wantonly injuring him, after his presence on the track was discovered; and that ordinances as to speed and flagman are for the benefit and can be invoked in aid of those only who are crossing the railroad at highway or street crossings.

It is the general and well-settled rule that the right of way of a railroad company is its exclusive property upon which no unauthorized person has a right to be, for any purpose, and that any person who travels upon such right of way, not for any purpose of business connected with the railroad, but for his own mere convenience as a foot-way, is a wrong-doer and a trespasser (*I. C. R. R. Co. v. Godfrey*, 71 Ill. 500; *I. C. R. R. Co. v. Hetherington*, 83 Ill. 510; *Blanchard v. L. S. & M. S. R. R. Co.*, 126 Ill. 416); that a railroad company owes no duty to a person walking along its tracks without its invitation, either express or implied, except to refrain from wantonly or wilfully injuring him, and to use reasonable care to avoid injury to him after he is discovered to be in peril, and it makes no difference in the respect whether he is a trespasser, a mere licensee, or one who is on the tracks by mere sufferance, without objection of the company. *I. C. R. R. Co. v. Eicher*, 202 Ill. 556.

It is not charged, in either of the counts in question, that the death of plaintiff's intestate was due to the wilful or wanton acts of the servant of defendant. If, therefore, it appears from the averments of either of said counts that the deceased, at the time he was killed, was a trespasser upon the right of way of the defendant, it follows that the demurrer thereto was properly sustained.

Counsel for defendant contends that a person walking

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along, upon or between railroad tracks at a public crossing is a trespasser. That the fact that he is struck and injured or killed at such highway crossing does not impose upon the railroad company any duty different from that which it would owe him at other points upon its right of way. That his crossing the street or highway is a mere incident of his passing upon or along the railroad.

It has frequently been held that one who travels upon or along a railroad track longitudinally, is a trespasser, and is as a matter of law guilty of negligence. We do not understand, however, that the rule applies to persons traveling upon or along or across a right of way at the intersection of a public highway or street. An examination of the authorities cited by counsel, in which the foregoing rule is announced, will disclose that in each instance the injuries for which recovery was sought were received upon or at either the private right of way, the yards or depot grounds of the railroad company.

It is also the law that where one uses the right of way of a railroad where it is crossed by a public highway, not as a part of the public highway for travel or passage, but for his own private purposes, he thereby becomes a trespasser and the railroad company in consequence owes him no duty, except not to wilfully or wantonly injure him. *Robards v. R. Co.*, 84 App. 477; *R. Co. v. Hibsman*, 99 App. 405; *Smith v. C. & E. I. R. Co.*, 99 App. 296. We are of opinion, however, that in using such crossing, as a part of the highway, to avoid being deemed in law or in fact, a trespasser, a person is not bound to pursue any particular angle or direction when passing over the same; that he may not only pass directly over the right of way, but he has a right also to pass from one side of the highway to the other, using the right of way of the railroad for that purpose, for the entire or any part of the distance; in short, that he may pass over and upon such right of way at any angle or in any direction he desires, so long as he remains within the limits of the street or highway.

The rights of a railroad company and of the public to

use a street or public highway, are mutual, reciprocal and equal, and neither are paramount to the other. Both have the right to pass and repass over them in the modes adapted to their construction; and each is under equal and reciprocal obligations to observe the rights of the other; and neither can wilfully, wantonly or negligently endanger, obstruct or delay the other in the enjoyment of its rights, without incurring liability for the injury, and each in the exercise of its right must observe prudence, circumspection and skill to avoid injuries to others.

The deceased had the undoubted right to travel this public street "in the pursuit of his business, pleasure, or even caprice," and we are of opinion that if at the time he met with his death he was passing over or along the right of way, within the limits of the street, he was where he had a right to be, and not a trespasser. And this is so without regard to whence he came or whither he was going.

These views are not in conflict or inconsistent with those heretofore expressed by this court in the case cited by counsel for defendant in support of his contention.

In the Smith case, *supra*, it appeared from the averments of the declaration that the deceased was killed while using the railroad track as a footway, and not as a highway or street crossing. It was accordingly held that she was a trespasser and that a demurrer to the declaration was properly sustained.

In the Hibsman case, *supra*, the deceased was, when killed, using the rail of the railroad track for his own convenience to fashion a piece of wire into a "chicken hook." He was held to be a trespasser, for the reason that the right of way was the property of the railroad company, upon which no unauthorized person had a right to be for any purpose; that the mere fact that the deceased was partly upon the street crossing while so using the rail, did not render him any the less a trespasser, for the reason that such crossing was only authorized to be used by the public for highway purposes, while the evidence was conclusive that he was not using it as a highway.

In the Robards case, *supra*, the question as to whether or not the plaintiff was a trespasser does not appear to have been directly considered or determined.

The foregoing views apply also to the first and fourth additional counts of the declaration, which aver in substance, a violation of the speed limit fixed by village ordinance, resulting in the killing of deceased by a passenger train while on his way to work, and in the line of his duty as a section man for the defendant, and while walking southward on the north-bound track, at the crossing of said public street, where trains met and passed.

The second and third additional counts aver, *inter alia*, that on the day of the accident the deceased was a section man in the employ of the defendant; that it was his duty to repair work on a section of its tracks extending through the village; that he resided 200 feet west of said tracks and 600 feet northwest of Benton avenue; that he was a member of a crew of section men who, by orders of the defendant, during the night, kept their tools required in the performance of their duties in a house 2,000 feet south of Benton avenue; that the proper performance of the duties of the deceased required that he go to said house each morning to receive orders and obtain his tools; that to reach said house promptly it was necessary that he go 200 feet east on said tracks and thence southward to said house; that on said day while in the discharge of his duty, he started to said house in the usual and necessary way and that when fifty feet south of the crossing he was struck and killed.

Assuming the facts averred to be true, we are unable to perceive why the deceased was not a trespasser, at the time the accident occurred. He was not engaged at the time in the line of his employment. The counts specifically aver that he was on his way to the place where he received his orders and obtained his tools. He was not at the time subject to or under the orders or directions of defendant. It is not averred that he was ordered or had even received permission to use the right of way in going to his work, nor that appellant knew that he was so using it; nor is it

sufficiently averred that the use of the track was necessary in order that he might get to his work. The averment that it was necessary to use the tracks to get to the section house promptly, is but a conclusion of the pleader and not being well pleaded is not admitted by the demurrer.

No facts are averred showing that such route was so necessary. Neither does it appear that the nearest route to his work was over the right of way nor that no street, alley or highway led thereto. The mere fact that it was more convenient for him to use the right of way than some other route did not warrant or excuse him in doing so. No facts are averred which created a greater or different duty from the defendant than that due to an ordinary trespasser. It is apparent upon the face of the counts under consideration that the deceased was a trespasser and for that reason they are obnoxious to demurrer.

Plaintiff in error contends that under section 87 of chapter 114 of the Revised Statutes, all the counts state a cause of action. Said section provides that where an injury has been done to person or property in consequence of running a train in an incorporated city, town or village, at a greater rate of speed than is permitted by any ordinance of such city, town or village, such injury must be presumed to have been inflicted by the negligence of the railroad company, or its agents, in operating such train. The statute, however, does not declare that the running of trains at a rate of speed in violation of the ordinance is of itself negligence, but only that negligence is presumed from a violation of its provisions. As we have said, under the averments of the second and third counts the deceased was a trespasser to whom defendant owed no duty except not to wilfully injure him. Where there is no duty there can be no negligence. The statutory presumption of negligence is thus met, and is therefore unavailing in this case.

The trial court properly sustained the demurrer as to the second and third additional counts, but erred in sustaining it as to the others.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

William Swartz v. David Atchison.

1. **MEASURE OF DAMAGES**—*in action for breach of warranty.* In an action for a breach of warranty, the measure of damages is the difference between the market value of the original warranty and the market value of the same in the condition it actually was at the time of the sale.

2. **VERDICT**—*when not disturbed.* A verdict will not be set aside on appeal as contrary to the evidence where such evidence is conflicting and the verdict does not appear to have been the result of prejudice or passion.

Action commenced before justice of the peace. Appeal from the Circuit Court of DeWitt County; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

JOHN FULLER, for appellant.

LEMON & LEMON, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This action, which was brought by appellee against appellant to recover damages for an alleged breach of warranty of a horse sold to him by appellant, has been tried with varying results before a justice of the peace and twice by jury in the Circuit Court. The last trial resulted in a judgment for the plaintiff for \$5, from which the defendant appeals. The evidence as to whether there was a warranty as alleged, is conflicting, appellee testifying that there was and appellant to the contrary. There was no evidence tending to corroborate either, and the jury evidently believed appellee and disbelieved appellant. We see no reason to disturb their finding. It is not controverted that the horse was unsound when purchased by appellee.

The breach of warranty having been established, plaintiff was entitled to recover as damages the difference between the market value of the horse, had he been as warranted, and his market value in the condition he actually was at the time of the sale. Appellant admits in

argument, that this difference is shown by the evidence to have been at least \$85, and insists that the inadequacy of the verdict indicates that it was not based upon the evidence, but was the result of sympathy for the plaintiff. We find nothing in the record warranting such contention. While the verdict is much smaller than the evidence warranted, advantage of that fact can only be taken by appellee.

The judgment will be affirmed.

Affirmed.

C. L. Utter v. George N. Buck.

1. **ELECTION**—*when error to require.* It is error for the court to require the plaintiff to elect whether he will seek to recover upon an express contract or upon an implied one, where, even if the existence of the express contract was not established, the plaintiff was entitled to recover for services rendered by him and accepted by the defendant.

Action of assumpsit. Error to the Circuit Court of Coles County; the Hon. J. W. CRAIG, Judge, presiding. Heard in this court at the May term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

MUNDY & PHIPPS, C. C. LEE and S. Z. LANDES, for plaintiff in error.

EDWARD C. & JAMES W. CRAIG, JR., for defendant in error; CRAIG & KINZEL, of counsel.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in assumpsit, by plaintiff in error against defendant in error, to recover for services alleged to have been rendered to defendant in error, in making sale of certain real estate situated in the State of Indiana. The first three counts of the declaration are based upon an alleged express contract, and the fourth count upon an implied contract under which he seeks to recover whatever he deserved. A trial by jury resulted in judgment against

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plaintiff in bar of action and for costs, to reverse which he appeals.

The express contract was alleged to be contained in a letter written to plaintiff by defendant, whereby defendant offered to pay plaintiff a commission of \$1,125 if he would sell the land in question at \$35 per acre. There is evidence tending to prove that upon receipt of the letter, plaintiff acting thereunder endeavored to, and finally did find a purchaser for the farm, to whom it was sold, although not upon the precise terms named in the letter. The question as to whether or not the contract had been annulled prior to such sale was controverted. The evidence, however, clearly shows that it was through the efforts of plaintiff that the sale was effected, and that defendant accepted and appropriated the benefit thereof.

Upon the trial, and before the introduction of any evidence, the defendant moved for a rule upon the plaintiff requiring him to elect whether he would prosecute his action under the counts averring an express contract, or under the *quantum meruit* count. The court reserved its decision upon the motion, whereupon the plaintiff introduced evidence tending to establish an express contract, after which the plaintiff was asked while upon the witness stand what effort, if any, he had made to sell the land. Counsel for defendant objected to the question and the court inquired as to the object of the testimony. Plaintiff's counsel stated that the evidence was offered to show that plaintiff had earned the contract price mentioned in the letter; that even if the express contract had been annulled, plaintiff had sufficiently proved that he had performed the services, and was therefore entitled to recover. The court thereupon ruled that plaintiff must then and there elect whether he would rely upon the theory of an implied or express contract, to which ruling the plaintiff excepted, and rested his case.

The ninth instruction given to the jury at the request of the defendant, was the following:

"The court instructs the jury that the plaintiff is suing

on the letter of November 26, 1901; the court instructs you that it is for the plaintiff to prove, by a preponderance of the evidence, that there was a contract existing between the plaintiff and the defendant, as claimed by the plaintiff, and, unless you believe from a preponderance of the evidence that the plaintiff has proven that on the 3rd day of October, 1902, there was such a contract in effect, it will be your duty to find for the defendant."

Notwithstanding plaintiff, when put to his election by the ruling of the court, did not so elect in express terms, we think that his action in resting, and failing thereafter to offer or introduce evidence as to the extent and character of his services, was in effect an election by him to rely upon the express contract. If the contention of defendant that plaintiff failed so to elect, is warranted, the giving of the instruction referred to was error.

If the court had not so understood, the instruction undoubtedly would have been refused. We are of opinion that the ruling of the court in question was clearly erroneous. If the contract was in force when the services were performed, notwithstanding they were not performed in strict accord with the terms thereof, plaintiff, nevertheless, was entitled to recover upon the *quantum meruit*. Even if it were shown that the contract had been abrogated or annulled, as contended by defendant, if the plaintiff had performed services for the defendant, the benefits of which were accepted and appropriated by him, he was entitled to recover the reasonable value of such services. Under the ruling of the court and the instruction referred to, plaintiff could only recover under the contract, and by showing that the same was in force and effect at the time of sale. The error could not have been otherwise than prejudicial to the plaintiff, and the judgment of the Circuit Court must be reversed and the cause remanded.

Reversed and remanded.

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E. E. Earp, et al., v. America D. Lilly.

1. VERDICT—*when not disturbed.* A verdict will not be disturbed as contrary to the evidence where it fairly tends to prove the allegations of the declaration and the defendants have not taken the stand and testified in contradiction of the facts *prima facie* established by the plaintiff's proof.

2. INSTRUCTION—*when, proper, which pertains to joint and several liability of the defendants.* An instruction in an action under the Dram-Shop Act is not improper which tells the jury that such action was several, when in fact it is joint and several, and likewise tells the jury that they might find all, some or none of the defendants guilty.

3. EXEMPLARY DAMAGES—*when award of, proper, in action under Dram-Shop Act.* Where the evidence tends to show that the defendants sold liquor to a person whom they must have known was in the habit of becoming intoxicated, an award of exemplary damages is warranted.

4. DRAM-SHOP ACT—*what does not bar action under.* The fact that the plaintiff in an action instituted under this Act had written a letter to the defendant, requesting his aid in checking the drink habit of her husband, in which she stated that she has no objection to the sale to her husband by the defendant of an occasional drink, does not bar an action.

5. DRAM-SHOP ACT—*what does not affect general liability of defendants in action under.* The question as to when the several defendants to such an action began the sale of intoxicating liquors, does not affect their joint liability for injuries resulting from habitual intoxication resulting from such sales.

6. JURISDICTION—*limit of Appellate Court's.* The Appellate Court has no jurisdiction to pass upon the question as to whether a particular statute is constitutional.

Action on the case under Dram-Shop Act. Appeal from the Circuit Court of Moultrie County; the Hon. W. C. JOHNS, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

SENTEL & WHITFIELD, J. J. FINN and J. C. LEE, for appellants.

R. M. PEADRO and EDWARD C. CRAIG, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a suit brought July 22, 1904, by America D.

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Lilly, appellee, against appellants, Tolen, Earp, Goldburg, Monroe, Hammons and four others, to recover damages under the Dram-Shop Act, resulting from alleged sales and gifts to her husband, John P. Lilly, of intoxicating liquors. She obtained a verdict in the Circuit Court against appellants for \$2,500. Motions by the defendants for a new trial, and in arrest of judgment, were overruled and judgment entered on the verdict. The cause is brought to this court upon an appeal by all the defendants against whom judgment was rendered.

The declaration, to which the general issue was interposed, consists of two counts; the first alleges, in substance, that the defendants were the keepers of dram-shops, and as such, sold and gave to John P. Lilly, the husband of plaintiff, intoxicating liquors, and thus caused him to be, and become, an habitual drunkard, etc., whereby plaintiff was injured in her means of support. The second count alleges the same facts, and further, that said Lilly, while so intoxicated, squandered a large amount of money and property belonging to plaintiff, and that she was thereby injured in her support and property.

The errors chiefly relied upon for reversal, are, that the verdict is contrary to law, is not sustained by the evidence, and is excessive; that the trial court erred in its rulings upon the instructions; and that the Dram-Shop Act is unconstitutional.

The following facts are clearly established by the evidence: America D. Lilly, the appellee, was, on August 18, 1898, married to John P. Lilly, who, at that time and at the time of bringing this suit, was the owner, editor and proprietor of the Saturday Herald, a newspaper published and printed in Sullivan, Illinois. He also owned and conducted a large and profitable printing establishment in Moultrie county, then worth about \$3,500. At the time of her marriage, appellee, who had been a school teacher, had accumulated about \$1,200. Lilly was then healthy, vigorous, sober, industrious and attentive to business. The circulation of his paper was about 1600. The business was

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prosperous and was earning a surplus each month. About eight months after his marriage, Lilly began to use intoxicating liquors to excess, and gradually became a habitual drunkard, spending the greater part of his time, and his, and appellee's money, in different saloons. He was often so intoxicated that he was unable to attend to his business affairs and finally almost entirely neglected the same. He frequently indulged in protracted spree's lasting for several days, and sometimes a week. His health became so greatly impaired thereby, that he finally became a physical and mental wreck, and unable to work, had he so desired. As a result he lost many of his patrons and the business depreciated to such an extent that appellee was compelled to take charge of and conduct the same, to prevent a total loss of the money invested. At the time of the bringing of the suit at bar, some \$800 of appellee's private means had been expended; the printing plant and newspaper had depreciated in value to the extent of from \$1,000 to \$1,500, and was not paying expenses; the rent was a year in arrears, and other indebtedness to the extent of about \$700 was outstanding and unpaid. The evidence further shows that during the last six years appellee had received but \$75 with which to clothe herself; that she was compelled not only to attend to her household duties and make and repair her husband's wearing apparel but that she was also compelled to devote almost her entire time to the conduct of the business; that she was compelled to take her meals at irregular hours and subsist upon the plainest and cheapest food. It is strenuously insisted by counsel for appellants that even if Lilly was an habitual drunkard, the evidence fails to show that such condition was caused, in whole or in part, by liquor furnished to him by appellants.

We have carefully considered and weighed the evidence as contained in the record and are of opinion that it fully warranted the jury in finding that Lilly frequently visited the various saloons of the several appellants, and that it may be reasonably inferred from the evidence that his habit of becoming frequently intoxicated was well known

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to them. There is evidence tending to show that he drank liquor in the saloons of each of them, and in several instances when he was in an intoxicated state. We will not attempt here to rehearse or discuss the testimony of the different witnesses in detail. It will suffice to say that the jury were warranted in finding therefrom, that the proximate and efficient cause of his physical, mental, moral and financial degradation, was due in part, at least, to the intoxicating liquor furnished to him by the several appellants. Neither of them saw fit to testify in his own behalf, nor to call witnesses to controvert the material facts. We therefore would not be justified in disturbing the finding of the jury, which has been approved by the trial judge.

In *O'Halloran v. Kingston*, 16 App. 659, this court said: "It is urged that as to some of the appellants the proof is not sufficient; that it does not show that their sales contributed in any substantial or material degree to the habitual intoxication of the plaintiff's husband. As already stated, we think this position not well taken. It is shown that he visited all the places in question and obtained more or less liquor at each. How much he obtained at each and to what extent the act of each defendant contributed to the habitual intoxication it is impossible to state with certainty. * * * And while those who contribute in a small degree may be thus made to suffer as much as those who are more culpable, yet it is a condition which is applied to the traffic in liquor which the legislature had the power to impose, and which the courts cannot ignore.

"It must be remembered also, that the risk thus involved was known to and therefore voluntarily assumed by appellants when they engaged in the business, so that, in a legal sense, it cannot be said that they are surprised by the enforcement of the law. With the policy of the law we have nothing to do. That is a question for the legislature."

It was there further held that it will not avail defendants in cases of this character to show that other persons, as well, had furnished liquor to the intoxicated person.

It is contended that the court erred in giving to the jury

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the instructions offered by appellee. The first told the jury that the action was several, when in fact it was joint and several; but it further told the jury that they could find all, some or none of the defendants guilty. We fail to perceive how the error complained of could have prejudiced appellants. An instruction substantially similar to the second was approved by this court in *Herring v. Ervin*, 48 App. 369, and in *Moulton v. Gibbs*, 105 App. 104. It is insisted that the fifth and sixth instructions, which relate to exemplary damages, were erroneous for the reason that there was no proof of actual damages, nor any upon which the award of exemplary damages could be predicated. We are of opinion that actual damages to the extent of the amount of the verdict are clearly shown. The uncontradicted evidence of appellee shows that not only were her private funds dissipated to the extent of \$800, but that she was, by the wrongful acts of appellants, deprived of necessities, comforts and luxuries, which she would otherwise have enjoyed. The uncontroverted evidence shows that the value of the printing establishment and newspaper business had decreased to the extent of from \$1,000 to \$1,500, and that indebtedness of \$800 had accrued for which such property was liable. The means of appellee's husband, who was legally and morally bound to supply her with the necessities and comforts of life, were to this extent diminished. His capacity to follow his chosen avocation was almost, if not entirely, lost. To the extent, at least, of a right to a sufficient and comfortable maintenance, she had an interest in his capacity to labor and in all his resources. In *Meidel v. Anthis*, 71 Ill. 241, it is held that the phrase "means of support," in its general sense, embraces all those resources from which the necessities and comforts of life are or may be supplied, such as lands, goods, salaries, wages, or other sources of income, and in a limited sense, any resource from which the wants of life may be supplied.

We are, however, of opinion that the jury were not unwarranted in assessing exemplary damages.

The evidence tends to show that appellants sold liquor

to one whom they must have known was in the habit of becoming intoxicated—in other words, to an habitual drunkard. They were, therefore, guilty of a wilful violation of the statute. *Wolfe v. Johnson*, 45 App. 122.

In *Kennedy v. Sullivan*, 136 Ill. 94, the court says:

"The evidence shows that Cornelius Sullivan was a man who was 'in the habit of getting intoxicated,' and it justifies the conclusion that such fact was fully known to all the defendants. Any sale or gift of intoxicating liquor to him was therefore unlawful. * * * The sales, if made, were wilful violations of the law which forbids such sales to a person who is intoxicated. It was a question of fact for the jury to determine, whether or not the defendants had been guilty of wilful, wanton, reckless and unlawful misconduct. We are not prepared to hold, under the circumstances of the case as disclosed by the testimony, that it was error to give the jury an instruction under which, if they thought it just and proper, they might allow exemplary damages."

On May 10, 1904, appellee wrote to appellant Goldburg a letter which was introduced in evidence by appellants, but not abstracted by counsel, which letter is as follows:

MR. GOLDBURG.

I ask you in a friendly way if you cannot discourage Mr. Lilly loafing and drinking in your saloon; he is drinking so very hard; don't you realize the fact that he is being ruined mentally, physically and financially? Why not ask him to desist; reason with him; can't you help me to influence him to take some interest in life? I would like to have him do something to regain his health; sure it is no recommendation to your business to have wrecks charged to your shop. You know when he has enough; can't you stop him? Then I would not object to an occasional drink, if he would drink and go about his business. Won't you please refuse him? As a friend I call your attention to his condition. Who is responsible—the saloons of the town. You surely have noticed his inattention to business. You know the cause—you will know the result.

MRS. JOHN P. LILLY.

Earp v. Lilly.

The ninth instruction offered by appellee told the jury in effect, that although the plaintiff wrote to the defendant Goldberg that she did not object to his selling her husband liquor occasionally, that fact would not of itself bar her right to recover in this case, but that fact might be considered by them in mitigation of damages.

Appellants contend that the instruction was erroneous for the reason, that under the law the statement by appellee referred to, barred her right to recover against Goldberg unless it was shown that he sold her husband liquor more often than "occasionally." The construction sought by counsel to be placed upon the language in question would be manifestly unwarranted, unreasonable and unfair. The instruction is not subject to the objection interposed, and is, in fact, much more favorable to appellant Goldberg than otherwise. It, in effect, informed the jury that the letter tended to mitigate the damages, a matter upon which reasonable minds may well differ.

It is urged that the court erred in refusing to give appellants' third instruction, which told the jury that if defendant Goldberg was not in business and made no sale or gift of liquor to the husband of plaintiff, prior to the 10th day of May, 1904, although he may have sold or given liquor to the husband of plaintiff between that time and the commencement of this suit, he could not be held liable for any greater sum than the amount of damages sustained by her in her property or means of support between such time and the commencement of this suit. The instruction was properly refused.

The question as to the several defendants beginning their sales of intoxicating liquors at different periods does not affect their joint liability for injuries resulting from habitual intoxication resulting from such sales.

In *Lane v. Tippy*, 52 App. 532, it is said: "It is contended, in effect, though not in exact terms, that in order to render appellants jointly liable their sales must have begun at the same time and must have kept pace together to the end of the period sued for. Such a construction of

the law would make it hopelessly inoperative. * * * If the sales of one appellant began a few weeks or even months before the sales of the others, yet if the sales were continued contemporaneously for a period of time, appellants are all responsible for the damages resulting within reasonable limits, and it is not necessary, with surgical precision, to sever the damages so that they may begin and end with the commencement and the cessation of contemporaneous sales."

Furthermore, the evidence in the record does not warrant the instruction in question.* Counsel for appellants contends that the evidence shows that Goldburg had only been in business since May 10, 1904. We think that the evidence of appellee and other witnesses clearly established the fact that he was engaged in the business prior to that date. While it is true that he testified that he had been in the saloon business since May 10, 1904, it is also true that he failed to testify that he had not been so engaged nor that he had not furnished liquor to Lilly prior thereto. If such was the fact, it may be reasonably assumed that he would have so testified expressly, unequivocally and categorically. Moreover, he states that he received the letter above quoted on May 10, 1904. If he had but started in business on that day, it is most remarkable that a letter of that character should have been written at that time. It is a significant fact that, notwithstanding appellee's appeal to him to desist, he failed, while on the witness stand, to state that he, to any extent, complied with or even heeded the same.

It is finally urged that the Dram-Shop Act is unconstitutional; that while purporting in its title to relate to the licensing of the sale of intoxicating liquors, in the body of the act, the giving of such liquors is restricted, which restriction in no way relates to the general subject of licenses; that the act is therefore in violation of article 4, section 13 of the Constitution of Illinois, which provides that no act thereafter passed shall embrace more than one subject, and that shall be expressed in the title. The validity of the statute in question is vital to the case at bar. The act

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creating Appellate Courts withholds from our jurisdiction cases involving the validity of statutes, or the construction of the constitution. It is therefore unnecessary for us to determine the question.

In the light of the foregoing views the judgment was proper and must be affirmed.

Affirmed.

Lorenzo H. Turner v. Thomas H. Righter.

1. INSTRUCTION—*must not assume facts in dispute.* An instruction is improper which assumes a fact in dispute.

2. INSTRUCTION—*must not give undue prominence to particular facts.* An instruction is improper which gives undue prominence to particular facts in controversy in a cause.

3. INSTRUCTION—*when not cured by presumption.* Where the evidence heard in a cause is not preserved, no presumption arises to cure an error in an instruction which consists in assuming the existence of a fact in controversy.

Action of assumpsit. Error to the Circuit Court of Shelby County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

WALKER & BRADLEY, for plaintiff in error.

W. C. HEADEN and CHAFEE & CHEW, for defendant in error.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a suit in assumpsit by plaintiff in error against defendant in error. A trial by jury resulted in verdict and judgment for the defendant, to reverse which the plaintiff prosecutes this writ of error. The action was commenced October 31, 1901, and is based upon two bank checks, one dated July 5, 1893, for \$3, and the other dated April — 1894, for \$400, both alleged to have been drawn by defendant, and by the payee, one Turner, assigned to

plaintiff. The defendant pleaded non-assumpsit, set-off and a verified denial of the execution of the checks. The bill of exceptions recites merely that "on the trial plaintiff gave in evidence testimony tending to prove the issues in his behalf, and defendant gave in evidence testimony tending to prove the issues in his behalf, and the evidence in support of the issues was conflicting."

The court, at the request of defendant, gave to the jury the following instruction :

"The court further instructs the jury that in reaching a conclusion as to whether either one of said checks was signed by the defendant and is a check made by him, the jury have a right to take into consideration all of the facts in evidence relating to said checks, the circumstances and conditions surrounding the parties to the transactions, the delay in presenting the said checks for payment, together with all the other facts and circumstances proven in this case."

The instruction in question not only assumed that there was, as a matter of fact, a delay in presenting the checks for payment, but in addition thereto called the especial attention of the jury to such assumed fact, thus giving it undue prominence. The effect of it was to give the jury to understand that in the opinion of the court the fact of delay was of more importance than any others appearing in evidence. The fact that they were told that they had a right to consider the fact of delay "together with all the other facts and circumstances proven in the case," did not render the instruction any the less misleading. It but tended to emphasize the importance of the fact of delay over all others.

The rule that to single out and give undue prominence to a single fact or several facts in an instruction, is error, as calculating to mislead the jury, is so well established as not to require the citation of authorities. The instruction is further misleading in that it authorized the jury to consider "the circumstances and conditions surrounding the parties to the transactions." As to which of the parties, whether the alleged drawee or assignee of the checks, is referred to, what particular circumstances or conditions

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are to be considered, whether those are meant which surrounded the parties at the time of the alleged execution of the checks, or those at the time the checks were assigned to plaintiff, or those existing at the time of bringing the suit, or at the trial, the jury are not advised.

Counsel for defendant in error insists that not having the full record before us, we cannot assume that the fact of delay was controverted, but should assume that the court gave the instruction because the delay was a fact admitted by both parties; that inasmuch as it is not every error that is cause for reversal, but that it must appear that the error was prejudicial to the party complaining, by bringing the cause before the court upon a short record, plaintiff in error concedes that the evidence fully sustained the defense interposed, and that the judgment should, therefore, be affirmed notwithstanding error may have been committed in giving the instruction.

In *Costly v. McGowan*, 174 Ill. 79, the case was brought to the court of review without preserving the evidence in the record, and it was insisted by defendants in error that it was, therefore, impossible for the court to determine that the giving of certain instructions complained of was reversible error. It was there held that it is only where the evidence is all preserved in the record, and the court can see from it that the jury could have reached no other conclusion than they did, had the instructions and all the rulings been correct, that a court of review will affirm notwithstanding error may have been committed in giving and refusing instructions.

In the case at bar only the legal question as to the correctness of the instruction in question is presented. The instruction was clearly erroneous, and the evidence not being preserved in the record, we cannot presume that the verdict of the jury was right notwithstanding the error in giving the same.

The judgment will accordingly be reversed and the cause remanded.

Reversed and remanded.

**Chicago & Alton Railway Company v. Alvyn Henline,
et al., Copartners.**

1. INSTRUCTIONS—*must not be contradictory.* It is error to give instructions which contradict each other as to material propositions of law involved in the cause.

Action on the case. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

KERRICK & BRACKEN, for appellant; F. S. WINSTON, of counsel.

WELTY, STERLING & WHITMORE, for appellees.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action on the case by appellees against appellant. The first count of the declaration avers that on the night of August 7, 1903, plaintiffs were moving a traction engine, propelled by its own power, along a public highway about two miles north of Towanda, in McLean county; that in crossing defendant's tracks and when said traction engine was between the two railroad tracks, the rear axle of the engine broke in passing over the east rail of defendant's west track and was thereby disabled so it could not be further propelled by its own power, and thereby blocked both tracks of defendant; that plaintiffs immediately notified defendant of such breakdown and blocking of the railroad tracks, whereupon defendant, pursuant to such notification, dispatched two of its locomotive engines to the scene; that defendant's servants in the early morning of August 8th, against the protest of plaintiffs and without their consent, negligently and carelessly coupled said locomotives to the traction engine by means of chains, and forcibly jerked and dragged it from one side to the other of the crossing, for the purpose of clearing the tracks, and by reason whereof the traction engine was broken and completely wrecked.

The second count is substantially the same as the first count, except that it avers that defendant's servants, while engaged in removing the engine from the railroad tracks of the defendant, did forcibly draw, jerk, pull and drag the same from one side of the railroad crossing to the other, in a reckless and careless manner, etc.

At the close of appellees' testimony, and again at the close of all the evidence, the trial court was asked by appellant to instruct the jury to find the appellant not guilty. These instructions were refused and a verdict returned in favor of appellees for \$1,050, upon which the court rendered judgment, whereupon the defendant appealed to this court.

The facts so far as material to the questions involved are as follows: Appellees, who were farmers, were the owners and operators of a steam threshing outfit, consisting of a traction engine, water tank and separator. The outfit was moved from one farm to another during the threshing season by power furnished by the traction engine. On August 7, 1903, at about 10:45 o'clock in the evening, appellees, while going east along the public highway north of Towanda, attempted to take the traction engine and separator in question, across the tracks of appellant, at a point where said tracks crossed the wagon road at an acute angle. In the effort to get the wheel of the rear driving wheel of the engine over the west track, the rear axle broke, letting one corner of the engine down so that it blocked both tracks. Notice of the accident was given to the agent of appellant at Towanda and appellees proceeded to dismantle the engine preparatory to removing it from the track. At about midnight two locomotives with accompanying crews arrived on the scene with orders to clear the track. Against the protest of appellees, appellant's servants proceeded to hitch the locomotives to the traction engine by means of chains and to drag appellees' traction engine back and forth up and down the track, the width of the crossing, and then by the means of ties bunted and rolled it off into the ditch at the side of the track, thereby causing the alleged injury.

The evidence tends to show that the engine weighed 6½ tons, the separator 7 tons, and the tank 1½ tons, and that when hitched together the outfit was about 100 feet in length; that to cross the tracks it was necessary to mount an incline on the west line of the right of way, of about 11 feet in a distance of 50 feet; that appellees first attempted to cross with the entire outfit but that the engine lacked sufficient power to pull it up the grade; that the separator was then detached, the tank pulled across the tracks and left, the engine then backed to and coupled with the separator, and another attempt made to haul it across; that the planking between the rails of the west track was so worn that the tops of the rails extended from one to two inches higher than the surface of the planks and that the lugs on one of the front wheels of the engine failed to take hold of the rail and on coming in contact with it in revolving, slipped and grated against the rail but failed to pass over it; that after making several attempts appellees finally placed a rock under the wheel to lift it over the rail and again started the engine, but that the rock flew out and through the friction of the wheel upon the rail the strain upon the axle became so great as to cause it to break.

Appellant insists that appellees were negligent in trying to pull the separator up the steep grade aforesaid and across the tracks; in failing to use a board or plank instead of a stone under the wheel; in continuing to run their stalled engine after the stone flew out, with the wheel whirling around on top of the rail, and in their failure to make proper efforts to remove the engine from appellant's tracks before the arrival of the locomotives. That inasmuch as it was not its fault that the engine broke down and obstructed the tracks, and it being its duty to remove the obstruction at the earliest practicable moment, in order that the safety of its passengers and employees might be protected, and traffic and the mail be not delayed, it had the right to remove the obstruction with such means as it had at hand, provided in doing so it used due care not to injure the engine further; that it was not bound to furnish

appellees with a derrick, jacks and other tools with which to remove it; and that there being no evidence to prove that appellant's servants did not remove the engine as carefully as was possible with the means employed, appellees cannot recover. That inasmuch as the evidence shows that appellees failed to use reasonable efforts to remove the obstruction within a reasonable time, after the expiration of such time they should be treated as trespassers to whom appellant owed no duty except not wilfully or wantonly to injure their property.

We are of opinion that if the facts were as assumed by counsel for appellant, the law would be as by them contended. In other words, if the obstruction of appellant's tracks at the crossing of a public highway was due to the negligence of appellees, or if they permitted the same to remain there an unreasonable length of time, appellant would be liable only for such injuries as were the result of its wilful or wanton acts. That if the obstruction was caused by an accident which could not have been avoided by due care on the part of appellees, they were entitled to a reasonable time within which to remove the same, and if appellant, before the expiration of such reasonable time assumed such duty, it was bound to exercise ordinary care in its performance and is liable for any failure in that behalf.

The questions as to due care on the part of the respective parties, whether the engine was handled by appellant in a reckless and careless manner, and what was a reasonable time for the removal of the obstruction by appellees, were sharply controverted upon the trial. The evidence bearing upon the same is close and conflicting. It was therefore the exclusive province of the jury to determine them.

If the jury had been accurately and perspicuously instructed as to the law applicable to the facts, and no error had occurred in the rulings of the trial court upon the evidence, we would not, under the circumstances, be warranted in disturbing its findings thereon.

By appellees' first given instruction, the trial court told

the jury that it was incumbent upon appellant to exercise reasonable and ordinary care to avoid injuring or damaging appellees' engine; that if the jury believed from the evidence that appellees' traction engine broke down upon appellant's tracks while crossing the same, and that appellant so carelessly and negligently removed the same as to break and injure the same unnecessarily, then appellant would be liable for all damages occasioned by such carelessness and negligence.

There was some evidence tending to prove that the accident was caused by the negligence of appellees, and that they failed to exercise reasonable diligence to remove the broken engine. These questions are both ignored by this instruction, and it was therefore error to give the same. The modification by the trial court of appellant's third and fourth instructions, by inserting therein the words, "and was negligent and reckless," was also error. Such modification rendered the instructions contradictory to others given, which correctly stated the law. While, as modified, they stated the law too favorably to appellant, the effect thereof could only have been to confuse and mislead the jury.

It is further insisted that the court erred in giving appellees' second and third instructions. It is not claimed that the true measure of damages was not correctly stated therein, but it is insisted that the evidence upon the question of damages was insufficient to warrant them. While the evidence as to the amount of actual damages was exceedingly meager, inasmuch as the cause must be remanded for another trial, it will not be necessary for us to pass upon the sufficiency of the same, nor to determine whether or not the verdict is excessive.

It is urged that the court in several instances erred in its rulings upon the admissibility of evidence. The objections not being argued are deemed to be waived.

For the reasons indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

Consolidated Coal Company of St. Louis v. Jones & Adams Company.

1. **PRODUCTION OF DOCUMENTS**—*when properly refused*. It is proper for the court to refuse to require the opposing party to produce documents desired to be offered in evidence, where such documents would have been immaterial if offered as evidence.

2. **CONTEMPT**—*when failure to obey subpoena duces tecum, not*. A witness is not guilty of contempt in failing to obey a subpoena *duces tecum* where it does not appear that he was given a sufficient length of time to comply with such subpoena and that the evidence was material and proper.

3. **OPTION CONTRACT**—*what not*. A contract which provides absolutely for the delivery and acceptance of a minimum amount of a given article is not violative of the statute prohibitive of option contracts, where it likewise contains a provision for the delivery of a maximum amount of such article at the option of the purchaser.

4. **CUSTOM**—*when proof of, incompetent*. Proof of a custom material to the issues of a case is ordinarily incompetent in the absence of a specific allegation thereof.

5. **OPENING CASE**—*discretion of trial court with respect to*. It is within the sound discretion of the trial court to grant or refuse an application for the opening up of a case and the introduction of additional evidence by a party who has rested his case.

6. **CONTRACT**—*construction of, with respect to requirement of furnishing cars for transportation*. Held, in this case, that notwithstanding the general rule of law, the parties to the contract in question had so acted and had so by their conduct construed the same that the obligation to supply the vehicles of transportation was upon the seller or shipper.

Action in assumpsit. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

LAWRENCE & FOLSOM, FORMAN & WHITNEL and CONKLIN & IRWIN, for appellant.

RUNNELS & BERRY, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in assumpsit by appellant against appellee. Recovery is sought upon a written contract be-

tween said parties, the material portions of which are as follows:

"Said first party (appellee) agrees and contracts to furnish to said second party (appellant) a minimum of 125 tons per day, and a maximum of 200 tons per day, of mine run or lump coal, from their mine located at Springfield, Illinois, during a period of nine months, commencing July 1, 1902, and ending March 31, 1903, at the following prices, f. o. b. mines: 'Lump,' \$.95 per ton; 'mine run,' \$.85 per ton. Shipments of either grade of coal to be made as ordered by the party of the second part, within the limits of the minimum and maximum quantities as above provided for. Said coal to be good merchantable coal, the lump coal to be screened over shaker screen with holes of not less than one and one-half inches in diameter, and over a screen of not less than fifty-six feet superficial area, and subject at all times to inspection at the mine by a representative of the party of the second part, and in the event of any of the lump coal not being in accordance with the specifications herein provided, party of the second part shall have the privilege of rejecting the coal. Weights as ascertained by the scales at the mine where the coal is loaded to govern settlement, and payments to be made on the 20th day of each month, for all coal shipped during the preceding month. It being understood and agreed that said first party will not be required to furnish coal under this agreement during any portion of the time when prevented by strikes, unavoidable accidents or other causes beyond its control from handling the product of the mine at which the coal herein provided for is produced."

The several counts of the declaration charge that pursuant to said contract, on August 8, 1902, appellant ordered from appellee 125 tons of lump coal per day, to continue until further notification; that on September 13, 1902, it ordered 200 tons per day until further notification; and concluded with an allegation of failure and refusal by appellee to deliver and consequent loss and damage to appellant.

In addition to the general issue two pleas were interposed to the declaration; the second amended, which pleads that appellee was prevented by strikes from furnishing the coal to appellant, and the third, which avers that the

contract in question was void beyond 125 tons per day as being an option contract under section 130 of chapter 38 of the Statutes of Illinois, to both of which pleas demurrers were interposed and overruled.

At the close of the evidence offered by the plaintiff, the trial court, on motion of the defendant, instructed the jury to return a verdict finding the issue for the defendant, which was done accordingly. Judgment was entered upon the verdict in bar of the action and against the plaintiff for costs. To reverse said judgment this appeal is prayed.

As the case was about to be set for trial, a motion was made by appellant for an order of court requiring appellee to produce telegrams and letters between the Chicago office of the appellee and its mine office at Springfield, and also sales books which it was claimed would show, if produced, the prices at which sales were made in the open market between September 1, 1902, and April 1, 1903. The motion was supported by affidavit, asserting that to recover a verdict in this case it would be necessary that the evidence show the difference between the market price and the contract price of the coal in question; that during the period of failure to deliver coal there was a material difference between the purchase price of the coal and the market price of the same coal; that defendant was engaged in the business of mining and selling coal, and that during the period of default in deliveries it sold in the open market large quantities of coal and obtained the market price; that deponent believed that appellee had sold in the open market the coal contracted by it to be delivered to appellant and obtained the market price therefor; that appellee was possessed of certain books that contained evidence as to market price pertinent to the issues in the case, and that appellant desired the same produced on the trial. A counter affidavit of H. C. Adams was filed setting out that if books desired were produced, the appellant, a competitor of appellee, would obtain an unfair advantage of appellee; that the books were large and voluminous and their production would entail unnecessary expense. The motion

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was overruled but was subsequently renewed in the same form just prior to the trial of the case and again overruled. On the same day a subpoena *duces tecum* was issued calling upon D. W. Heath, secretary and treasurer of the appellee, to produce the book referred to in the motion, upon the trial of the case. Heath failed to appear and a rule was entered requiring him to show cause why an attachment should not issue against him. In answer to the rule the affidavit of one H. C. Adams and a counter affidavit of one Richard S. Folsom were read, whereupon the rule was discharged.

The evidence discloses that although during the months of September, October and November, 1902, 14,375 tons of lump coal were ordered, only 2,864 tons were delivered; that during December, 1902, and January, February and March, 1903, 20,400 tons were ordered, upon which no deliveries were made. The evidence further shows that owing to a strike among the anthracite miners in Pennsylvania during the summer and fall of 1902, prices for bituminous coal began to rise in September, fluctuated somewhat during that and the following month and then rose rapidly during November and December, reaching the high point at the first of January, 1903, remained almost stationary during that month and slowly receded during February and March, becoming normal or thereabouts at the close of March, 1903.

Upon the trial, appellant offered the contract in evidence. Appellee objected to its admission on the ground that it "was not good beyond 125 tons." The court admitted it in evidence without limitation, but subsequently held that the basis of computation should be restricted to 125 tons per day, and that the contract was competent and admissible to that extent only.

Appellant then introduced evidence tending to show a breach of the contract by appellee and the market prices of coal during the period the defaults in delivery were alleged to have occurred, after which it rested its case. Appellee then offered and asked the court to give to the jury an in-

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struction directing a verdict for the defendant on the ground that the evidence failed to support the plaintiff's case. Whereupon appellant asked and obtained leave to introduce additional evidence, and over the objection of appellee, proceeded to introduce in evidence the letters hereinafter referred to. It then offered to show the custom in Illinois among mine owners and operators with reference to by whom cars were furnished, under contracts silent upon the question, and called witnesses for that purpose. Appellee objected to the admission of evidence of this character at that stage of the case. The objection was sustained, plaintiff again rested, and no further evidence was offered.

The appellant contends that the court erred, in construing the contract as an option contract and void as to all in excess of 125 tons; in refusing to enter an order requiring the production of appellee's books; in refusing to require the attendance of D. W. Heath in response to the subpoena *duces tecum*; in refusing to allow in evidence, testimony showing the custom regarding the furnishing of cars; and in instructing the jury to find the issues for appellee.

The refusal of the court to order the production of appellee's books or to punish the witness Heath for contempt for non-compliance with the subpoena *duces tecum* was proper. The affidavit in support of the motion for the production of the books, states that it was proposed to show by them that during the period of default in deliveries appellee sold the coal contracted to be delivered to appellant in the open market at the market price, and further that certain of said books contained evidence as to the market prices pertinent to the issues in the case. The measure of damages in case appellant was entitled to recover is fixed by the rules of law, and whether appellee had sold coal to other parties or what price it obtained was utterly immaterial to the issues involved. Nor would such books have been competent as tending to show the market prices of coal. Such market prices are ordinarily susceptible of proof by the evidence of witnesses, and were, in fact, so proved on the trial. Neither the motion nor affidavit stated that the books were neces-

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sary for the purpose mentioned. The ruling of the court, that proper and sufficient cause for making the order was not shown, was therefore proper.

The court was also justified in refusing to punish the witness Heath for contempt, for the reason that sufficient time in which to comply with the subpoena was not afforded him. He was subpoenaed at 8:30 o'clock at night to bring with him practically all the books and many of the papers of a large business and have them in court the next morning at Springfield, Illinois. When the writ was served upon him, he was at his house two miles from the books, which were on the twelfth floor of a building in Chicago. Furthermore, before a witness can properly be punished for contempt in failing to obey a subpoena *duces tecum*, there must be a proper averment by affidavit, of facts showing that the books and papers which the witness was called upon to produce are not only material, but proper evidence in the case. *Bentley v. People*, 104 App. 353; S. C., 107 App. 245. No such showing was made in the case at bar.

We think the trial court erred in holding that the provision of the contract for the delivery of coal in excess of 125 tons per day was void under section 130, chapter 38 of the Statutes, which reads as follows: "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, etc., shall be fined, etc., and all contracts made in violation of this section shall be considered gambling contracts and shall be void."

The language of that portion of the contract which it is claimed gave to appellant an option, is as follows: "Said first party agrees to furnish to said second party a minimum of one hundred and twenty-five tons per day and a maximum of two hundred tons per day, etc., shipments of either grade of coal to be made as ordered by the party of the second part within the limits of the minimum and maximum quantities as above provided."

In the case of *Schlee v. Guckenheimer*, 179 Ill. 593, it

was contended that a contract in the following language was an option contract and void under the statute in question, to-wit:

“Sold N. Schlee five cars of sample B barley at 62c a bushel, delivered Columbus, and five cars sample C barley at 57c a bushel, delivered Columbus. Shipments October 10th and 15th. Term cash. After these five sample cars of each grade have been received, weighed and examined and found satisfactory, Mr. Schlee has the privilege to order 10,000 bushels more of each grade same price, any time to December 31, 1887. If the freight rate is less than 12c a hundred any time between Chicago and Columbus, Mr. Schlee to have the benefit of same. Cars to be loaded not less than 800 bushels.”

In its opinion the court says:

“By the contract appellee sold five cars of sample B barley at sixty-two cents a bushel and five cars of sample C barley at fifty-seven cents a bushel, to be delivered at Columbus, Ohio, for cash, shipments to be made on October 10 and 15, 1887. This violated no provision of the statute nor any rule of the common law, and was acted on by the parties and carried out. It was a contract of sale, with a particular time of performance, at a specified price of a particular commodity, to be delivered at a specified place, the failure to comply with which contract by the seller or buyer would authorize the other to have his action for such non-compliance. These five cars of each grade are by the contract declared to be sample cars, and when ‘received, weighed and examined and found satisfactory, Mr. Schlee has the privilege to order 10,000 bushels more of each grade, same price, any time to December 31, 1887.’ This clause alone does not amount to a contract. It is a mere offer to sell 10,000 bushels each of two different grades of barley, according to sample, at a specified price for each grade, the offer to be accepted by a specified time. The clause does not constitute a contract for an option, such as that in *Schneider v. Turner*, 130 Ill. 28. The contract in that case was: ‘In consideration of one dollar and other valuable considerations,

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receipt of which is hereby acknowledged, I hereby agree to sell, etc., 1785 shares of the capital stock, etc., at \$600 per share,' etc., which was clearly a contract for an option.

"This proposition or offer is similar to every-day business transactions among the people of this State with reference to every character of commodities purchased for use. The offer to sell such a commodity at a specified price, if accepted by a specified time, does not constitute a violation of the statute. Its acceptance within that time is not prohibited or made a criminal offense, but is an every-day transaction necessary in carrying on business. There is nothing in this contract that is prohibited by the laws of this State, and hence it is not void. Nothing that was said in *Pope v. Hanke*, 155 Ill. 617, would require us to hold its provisions void. In that case the court found that the contract then before the court was a mere gambling contract, and was prohibited by the policy and laws of this State."

In *Osgood v. Skinner*, 211 Ill. 229, in discussing the question whether the contract there involved was an option contract within the meaning of the statute, the court says: "It is the duty of courts to enforce contracts or award damages for their breach, and it is generally sufficient to authorize a recovery if the evidence shows that one capable of contracting has entered into an agreement upon sufficient consideration. Such a contract is not to be strained for the purpose of bringing it within a criminal statute."

We think the views expressed by the Supreme Court in the cases cited, are applicable to the question under consideration, and therefore hold that the contract here involved was valid in all its parts.

It will not be necessary for us to determine whether or not evidence of a general custom relative to the furnishing of cars by mine owners or operators, if the same were sufficiently established, would ordinarily be admissible in aid of the construction of the contract under consideration. In the absence of any averment of such custom in the declaration, the question cannot be raised upon this record. In *Leggat v. Sand's Ale Co.*, 60 Ill. 158, the court says: "A

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particular custom must be stated in the declaration, and the rules, as to stating customs, are the same in pleas as in declarations, only greater strictness is required in pleas." See also, *McCurdy v. Alaska, etc., Co.*, 102 Ill. App. 120; *Mobile Co. v. Judy*, 91 App. 82. Moreover, no evidence pertaining to such custom was offered by appellant until after it had rested its case. Whether or not after it had closed its case and the motion by appellee to direct a verdict had been argued, it should have been permitted to introduce further evidence and the character and extent thereof, was a matter clearly within the sound discretion of the trial court. In the absence of clear abuse of that discretion, and none appears here, the action of the court in that regard is not reviewable. This rule of law and practice is so well established as to need no citation to support it.

It is insisted by appellee that its failure to deliver the coal according to contract was due to the lack of cars at its mines; that it was the duty of appellant under the contract to furnish cars upon which to load the same. On the contrary it is earnestly insisted by its counsel that such duty devolved upon appellee. The question is clearly the most important and vital involved.

The contract, it will be noted, contains no express provision as to which of the parties should furnish the cars. It does recite, however, that appellee agrees to furnish coal at the prices therein named, "f. o. b. mines," the initials or expressions f. o. b. meaning "free on board," and denoting that appellee thereby agrees to deliver the coal on board the cars "without cost to the buyer for packing, portage, carting and the like." (Bouv. Law Dict.)

The evidence shows that during the months of July, August, September, October and November, some 218 cars were loaded at the mines by appellee and shipped to appellant.

Upon the trial the following letters and telegrams from appellee to appellant's sales agent at Chicago, bearing the dates mentioned, were introduced and admitted in evidence:

September 20. "Instructions have been given the mine that will give you good shipments next week."

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October 4. "Replying to yours of the 3rd, we shall be glad to furnish you 200 tons of lump coal from our Springfield mine every day we get cars to do so. You understand, of course, we have some other contracts, and that the car supply is bad. We will divide the cars fairly and come as near filling your orders as we possibly can. We are advised by wire to-day that we have four Wabash cars and one C., P. & St. L. This has been a very bad week for us as State fairs generally cause our mine to be idle three or four days during the week."

October 16. "Beg to state that the mine has been instructed to make more liberal shipments to you. We, of course, have a great flood of other orders, most of them contracts, and we have been unable to give you as much coal as we would like to. Think, however, we can increase shipments and will do our best to accomplish this. We cannot give you any coal at Chicago or Peoria via C. & A., as we are entirely obligated for what cars we get in that direction."

October 22. "We regret to advise you that we have been unable to increase our shipments much to you lately, owing to the very bad car supply we have been getting. The Wabash have been furnishing us very few cars and the C., P. & St. L. have done but little for us. We have a number of other contracts on these roads and when the cars are divided up it does not enable us to take care of any one of them as we would like to. We are continually after both of these lines for cars, and hope to be able to make you better shipments shortly."

November 7. "We have been and are now getting a very scant supply of Wabash cars at our Springfield mine, and we have not been getting very many C., P. & St. L. cars lately. We propose to fill our contract with you during the month of November if the car supply will permit and we shall use every effort to get cars. We can only ask your further indulgence and do our best for you."

It appears from the foregoing correspondence that appellee ascribed its failure to make deliveries to the inability to procure cars, and that no request was at any time made of appellant that it should furnish cars, nor was complaint made that it had failed to do so, nor was any offer made by appellee to deliver upon condition that appellant would supply the necessary cars.

Counsel for appellee contend that in the absence of any

special provision as to who should furnish the cars, the contract must be governed by the general rules of law in such cases. That under such rules there is no ambiguity in the contract and no necessity for construction thereof by the court by the aid of the contemporaneous acts of the parties. Counsel for appellant, on the contrary, contend that inasmuch as the contract does not definitely determine which party should furnish the cars, that appellee having assumed the duty to supply them and having done so, by its acts showed that it understood that such was its duty. They invoke the well-established rule that "it is permissible in construing a contract, to look to the interpretation that the parties thereto have placed thereon, in its performance; for aid in ascertaining its true meaning" and that "no extrinsic aid can be more valuable." *Slack v. Knox*, 213 Ill. 195. That "where the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions; and the subsequent acts of the parties showing the construction they have put upon the agreement themselves are to be looked to by the court, and in some cases may be controlling." *Merrifield v. Canal Commissioners*, 212 Ill. 471.

While it is undoubtedly true, as contended by appellee, that as a general rule, where a contract for the sale of a commodity provides that the same is to be delivered free on board railroad cars or vessels, and where the contract is silent as to by whom such cars or vessels are to be furnished, it is the duty of the purchaser to furnish the vehicle of transportation (*Hocking v. Hamilton*, 158 Pa. St. 107; *Kunkle v. Mitchell*, 56 Pa. St. 100; *Chicago Lumber Co. v. Comstock*, 71 Fed. Rep. 477; *Baltimore, etc. v. Steel Co.*, 123 Fed. Rep. 655; *Davis v. Mining Co.*, 170 Mass. 391; *Evanston El. & C. Co. v. Castner*, 133 F. R. 409), it is also the law that where the contract does not definitely determine which party shall furnish the vehicle of transportation and the parties themselves have by their acts and conduct given the same a particular interpretation, and one of the parties has without objection or protest assumed

such duty, thereby lulling the other into a sense of security, such party is estopped to claim a different construction.

In *Crown Coal Co. v. Yoch Coal Co.*, 57 Ill. App. 666, it is said: "The appellee brought suit and recovered damages for the failure of appellant to comply with a written contract entered into between the parties. Appellee was operating a coal mine and on the 16th day of June, 1892, sold to appellant 'the entire output of lump coal' of its said mine, agreeing to furnish not less than a certain number of cars of coal weekly, at a certain price, between certain fixed dates, for which the appellant agreed to pay at a certain fixed time. The contract does not definitely determine which party should furnish the cars, but the appellant furnished the cars for all the coal that was delivered, and thereby placed a construction upon the contract in this respect, to which it cannot now object."

In *Consolidated Coal Co. v. Schneider*, 163 Ill. 393, which was an action by Schneider against the coal company to recover damages for its failure to accept and pay for coal, the court says: "The contract contains a provision in regard to the delivery of the coal, as follows: 'All f. o. b. cars at said mine'—which, as the evidence shows, means free on board the cars at the mine. The fact that appellees were required by the contract to deliver the coal free on board the cars at the mine can have no bearing on the question in regard to whose duty it was to furnish cars. The furnishing of cars at the mine to be filled with coal was an independent matter in no manner connected with the duty of filling the cars. When the cars were furnished, then it devolved on appellees to fill them free of any expense to appellant, but until the cars were furnished they were required to do nothing except to have the coal ready. It being the duty of appellant to furnish the cars under the contract, its failure to discharge that duty was a clear breach of the contract, for which appellees, who were ready and willing to furnish the coal, were entitled to recover."

While the foregoing quotation upholds the general rule

invoked by appellee, such conclusion of the court is not inconsistent with the views expressed in the Crown Coal Co. case, *supra*, inasmuch as the court, in the Schneider case, further says: "The contract is silent in regard to the party who shall furnish the cars, but the plaintiffs proved by a number of witnesses that before they commenced mining coal under the contract, Emery, the superintendent of the coal company, came into the mine and inquired if they were prepared to fill the contract. They asked him about cars, and he replied: 'I will see that you get cars. I will see that they put in six cars a day and I will look to you to fill them.' In addition to this testimony it was proven that appellees repeatedly called on the superintendent for more cars, and he never denied that it was the duty of appellant to furnish them, but, on the other hand, he promised to furnish cars or made excuses for appellant's failure to furnish them. It was also proven that at no time while appellees were occupying the mine under the contract did they procure or furnish any cars, but all that were furnished and filled came through appellant. From these facts it is apparent that the construction placed on the contract, both by appellees and appellant, was that appellant was required by the contract to furnish cars. In the construction of a contract it is always allowable to look to the interpretation the contracting parties place upon it, either contemporaneously or in its performance, for aid in ascertaining its meaning."

In C. & G. E. Ry. Co. v. Vosburgh, 45 Ill. 311, where a contract for the building of an embankment was under consideration, it is said: "It is true, the contract is silent as to which party was to furnish the earth, but the parties themselves gave a construction to the agreement, and they should be bound by it."

We are of opinion that the evidence adduced by appellant establishes a *prima facie* case and that the trial court erred in directing a verdict for the defendant. It follows that the judgment predicated thereon must be reversed, and the cause remanded for another trial.

Reversed and remanded.

Chicago & Alton Railway Company v. William T. Walters.

1. **FEDERAL STATUTE—how construed.** A federal statute which has received a construction by the Supreme Court of the United States will be construed according to the official arbitrament of such court.

2. **CAR-COUPLER—when does not comply with federal statute.** A car-coupler which does not couple automatically by impact without the necessity of men going between the ends of the cars, does not comply with the federal statute with respect to the character of car-couplers to be used in interstate traffic.

3. **CAR-COUPERS—what will not defeat liability for failure to furnish, in compliance with federal statute.** A railroad company cannot by promulgating a rule requiring its employees to perform their work in a particular manner, defeat a recovery in an action for an injury caused by its failure to meet the requirements of the federal statute with respect to car-couplers employed in interstate traffic.

4. **ASSUMED RISK—when does not apply.** Where the actionable negligence alleged is the violation of an express statute, the doctrine of assumed risk does not apply as against the party injured.

5. **EVIDENCE—when exclusion of proper, will not reverse.** The exclusion of proper evidence will not reverse where the evidence sought to be adduced would merely have been cumulative and its exclusion did not prejudice the complaining party.

Action on the case for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1904. Affirmed. Opinion filed April 20, 1905.

DEMANGE & HOBLIT, for appellant; F. S. WINSTON, of counsel.

LOUIS FITZ HENRY and BARRY & MORRISSEY, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

Appellee recovered a judgment against appellant in the Circuit Court of McLean County for \$4,000 for an injury resulting in the amputation of his right hand.

The original declaration charges that appellant being engaged in interstate commerce, negligently failed to have its certain caboose equipped with an automatic coupler for

coupling automatically by impact, as required by an Act of Congress, entitled, "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers," etc. The first additional count charges that appellant having attempted to equip its caboose with an automatic coupler negligently failed to keep the same in repair and permitted it to remain in an unsafe and dangerous condition, and the second additional count charges appellant with common-law negligence in permitting the coupler to become and remain in an unsafe and dangerous condition, of which condition appellant had notice and knowledge and appellee had no knowledge.

The principal ground urged in argument by appellant for reversal of the judgment, is the refusal of the trial court to give to the jury a peremptory instruction asked by appellant at the close of all the evidence in the case.

The facts in the case are substantially as follows: About eleven o'clock on the night of January 3, 1903, appellee, a freight brakeman in the employ of appellant, was called out as one of the train crew to make a trip from Brighton Park to Bloomington. In the line of his duty it became necessary to couple a locomotive and caboose, and for this purpose appellee got upon the foot-board of the tender or water tank attached to the locomotive and signaled the engineer to back the locomotive toward the caboose. While the locomotive was so backing slowly appellee attempted to open the knuckle of the coupler upon the locomotive, but was unable to do so because water from the locomotive tank had dropped upon it, and frozen it fast. Appellee then stepped off the locomotive, gave a signal to the engineer to back slowly and ran ahead to the caboose and there attempted to lift the coupling pin by operating the lever, but was unable to raise it sufficiently to permit the knuckle to open; he then lifted the pin with his left hand and at the same time was in the act of opening the knuckle with his right hand, when the locomotive still backing slowly, struck the caboose, crushing his right hand

between the open knuckle upon the caboose and the closed knuckle upon the locomotive.

The caboose and locomotive in question were both equipped with so-called Janney automatic couplers, designated by witnesses as standard automatic couplers, in general use upon all first-class railroads. The coupling device upon the caboose consists of a jaw or knuckle, hinged so as to open and close, with an iron lock-pin inserted through the knuckle when closed, to keep it in that condition. The head of the lock-pin is attached by a short chain to an iron rod, called the lifting-lever, fastened to the end of the caboose and extending to its outer edge, where it is turned at a right angle so as to form a handle. When the knuckle is closed and the pin in place, it is locked and can only be opened after lifting the pin by hand or by raising the handle of the lever, by spreading it apart with the hand. When the knuckle upon both cars to be coupled, is closed, the cars will not couple by impact, but they will couple by impact if the knuckle upon either one or both of the cars is open.

In the operation of coupling it is the duty of the operator to see that the knuckle upon one or both cars to be coupled is opened. If upon observation he finds both knuckles closed, he must by use of the lifting lever, or if that is not in working order, by some other means, lift the pin in the knuckle he desires to open and then open the knuckle with his hand. Lifting the pin and opening the knuckle are independent acts, but both necessary to be performed before the cars will couple. If the cars to be coupled are stationary and in proximity or one is stationary and the other being moved toward it, it becomes necessary for the operator to go between the ends of the cars to open the knuckle with his hand. The evidence tends to show that for two weeks or more prior to the accident, the lifting lever upon the caboose had been bent and out of repair, so that, in the ordinary method of lifting the pin by raising the handle of the lifting lever, the pin could not be raised sufficiently in the knuckle to permit it to open. If appellee

had been able to open the knuckle upon the locomotive it would have coupled with the caboose by impact merely and there would have been no occasion for his going between the two. Finding the knuckle upon the caboose also closed, appellee was obliged to go between the caboose and the approaching locomotive to open the knuckle.

It is not argued that the caboose in question was not, within the meaning of the Act of Congress, a "car used in moving interstate traffic," but it is insisted that it was equipped with a coupler such as is required by that act. Section 2 of the act in question is as follows: "That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." It is contended by appellant that the words "without the necessity of men going between the ends of the cars" do not apply to the act of coupling but apply only to the act of uncoupling. This is a federal statute and we are bound by the construction put upon it by the United States Supreme Court. While some of the federal circuit courts have held otherwise, the question has been recently definitely settled in *Johnson v. Southern Pacific Co.*, 25 Supreme Court Reporter, 158, in an opinion by Mr. Chief Justice Fuller. Referring to the words quoted, it is there said: "The phrase literally covers both coupling and uncoupling, and if read, as it should be, with a comma after the word 'uncoupled,' this becomes entirely clear. The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically." Inasmuch, therefore, as the coupler upon the caboose in question did not couple automatically by impact without the necessity of men going between the ends of the cars, it must be held that it did not comply with the requirements of the Act of Congress, and that under the provisions of section 8 of that Act appellee

cannot be deemed to have assumed the risk thereby occasioned.

It is not seriously controverted that appellant was guilty of negligence in permitting the lifting lever upon the caboose to remain bent so that the lock-pin in the knuckle of the coupler could not be lifted by raising the handle of the lever. Nor can appellant be permitted to excuse its negligence in failing to equip the caboose with a coupler coupling automatically by impact without the necessity of men going between the ends of the cars.

The main contention of appellant and the one presenting the most serious question involved is, that the trial court should have held as a matter of law that appellee was precluded from recovering damages because of his own contributory negligence.

Appellee was the only witness present and in a position to observe all that transpired at the time of his injury, and the statement of facts hereinbefore made, is substantially his version of the occurrence. It is argued that as appellee was in control of the movements of the locomotive through signals given by him to the engineer, it was his duty upon observing the condition of the coupler upon the locomotive to signal the engineer to stop before he attempted to adjust the coupler upon the caboose; that common prudence as well as the published rules of the company, of which rules appellee had notice, required him to ascertain, by examination, the condition of the coupling apparatus before signaling the engineer to back toward the caboose for the impact; that he must be held to have known and appreciated the danger of having his hand upon the knuckle of the coupler on the caboose, when the locomotive was approaching, and should have observed its proximity and removed his hand therefrom before the impact, and that a failure to observe these precautions constituted such contributory negligence upon his part as bars a recovery. It is further argued, that appellee was guilty of contributory negligence in disobeying the rules of the company, above referred to, prohibiting employees from coupling by hand in all cases where a

stick could be used to guide the link or shackle, and "in getting in between cars in motion to uncouple them and all similar imprudences."

The duty being enjoined upon appellant by statute, to equip the caboose in question with a coupler operating automatically, appellee, when he left the locomotive and ran toward the caboose, had a right to assume that the caboose was so equipped, and that by merely raising the handle of the lifting lever at the outer edge of the caboose, the coupler would be in a position to couple automatically by impact. Upon reaching the caboose appellee found that the lifting lever did not perform its office, either in whole or in part, and his attention was then necessarily directed to the duty of adjusting the coupler so that a coupling could be effected. True, upon ascertaining the situation, he might have signaled the engineer to stop the locomotive, or he might have stood aside and permitted the impact, and in either case, no injury would have resulted, but the emergency thus suddenly forced upon him could ordinarily be met in almost an instant by lifting the pin and opening the knuckle with his hands, and if he had succeeded in his effort in that direction, for which he ordinarily had ample time, he would not have been injured. Appellee must be held to have known that the locomotive was approaching the caboose, but he was acting hurriedly, in the darkness of midnight, to meet the emergency, and these conditions must to some extent have obscured his opportunity for deliberation and observation. All these circumstances and the inferences to be drawn therefrom, including the presumption to which appellee was entitled, that he would not knowingly incur physical pain, were proper to be considered and weighed by the jury in determining the question as to whether he was in the exercise of due care for his own safety. The rule promulgated by appellant prohibiting employees from coupling by hand and requiring the use of a stick in all cases where a stick could be used, obviously has no application to the case, but is intended to apply only to a type of link and pin couplers. Appellant cannot avoid the re-

quirement of the Act of Congress, by a rule requiring its employees to perform their work in a particular manner. Furthermore, it does not appear that a stick could have been used in opening the knuckle of the coupler upon the caboose.

Upon a careful consideration of the evidence in the case and the inferences to be reasonably drawn therefrom, we think the court properly refused to give to the jury the peremptory instruction asked by appellant, and we are not prepared to say that the finding of the jury, that appellee was not guilty of negligence contributing to his injury, is so manifestly against the weight of the evidence as to justify us in setting the same aside.

The court sustained objections to two questions asked appellee upon cross-examination, the answers to which would have shown that when appellee found the knuckle upon the locomotive frozen, he did not signal the engineer to stop before examining the coupler upon the caboose, and that after he ascertained that the coupler upon the caboose did not operate properly, he did not signal the engineer to stop or go slower. There was no valid objection to the question and the court should have permitted them to be answered, but it is clear from the evidence that appellee gave to the engineer no signal other than the one to back slowly toward the caboose, and his answer that he gave no other signal would have been cumulative merely. Sustaining the objection did not, therefore, prejudice the appellant.

The first instruction given on behalf of appellee is as follows: "If you believe from the evidence that the coupling apparatus was out of repair as charged in the declaration and that its condition and the effect thereof on the operation of the knuckle was not discoverable by the use of ordinary care, then and in such case the plaintiff cannot under the law be held to have assumed the risk of such defect." The objection urged to this instruction is, that the evidence shows that the coupling apparatus was in excellent repair; that only the lever-rod used to raise the pin

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for uncoupling purposes was out of repair. The objection is without merit. The lifting-lever must be held to be a part of the coupling apparatus and the latter cannot be said to have been in good repair when the lever necessary to operate it, was out of repair. The instruction as given stated the law more favorably to appellant than it was entitled to, because, as we have heretofore held, appellee did not assume the risk of operating a coupler which would not couple the caboose and locomotive without the necessity of his going between the ends of the cars. For substantially the same reasons, the objection urged to the sixth instruction given on behalf of appellee, is without force. The court did not err in refusing the third, sixth and eighth instructions tendered by appellant, for the reason that such of those instructions as was proper were covered by others which were given.

The record being free from prejudicial error and the verdict being supported by the evidence, the judgment is affirmed.

Affirmed.

**Willis E. Gray v. Bloomington & Normal Railway,
et al.**

1. *CONTRACT—when not void as constituting a voting trust.* A contract which has for its object the vesting and retaining for a fixed period the management and control of an enterprise in the persons who originally promoted the same, is valid so long, at least, as each of such parties retains his original interest and no other rights intervene, and the same may be enforced in a court of equity.

2. *CONTRACT—when sustained by sufficient consideration.* A seal to an instrument imports a consideration and will sustain the same against the charge of a lack of consideration.

3. *CONSIDERATION—what sufficient by way of.* Mutual promises made between and among the respective contracting parties constitute a sufficient consideration to support a contract.

4. *RESCISSION—what will effect.* Where parties to a contract which requires their procedure in a financial enterprise in a particular manner, adopt and pursue without the consent of the other contracting parties an entirely different mode of procedure than that provided by

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the contract, a rescission is effected as against the parties so departing from the terms of the contract.

5. *TRUST—what terminates.* Where parties in whom a trust is imposed depart from the terms thereof, they thereby render such trust ineffective as to them.

6. *LACHES—when rule of, applies.* A court of equity will apply the doctrine of laches in denial of relief only where, from all the circumstances, to grant the relief to which the complainant would otherwise be entitled, would be presumptively inequitable and unjust because of the delay.

7. *STOCKHOLDERS' MEETINGS—when valid.* Stockholders' meetings held pursuant to signed waivers of notice are valid.

8. *MULTIFARIOUSNESS—defined.* Multifariousness is the improper joining in one bill of distinct and independent matters.

9. *MULTIFARIOUSNESS—when bill not subject to charge of.* A bill is not multifarious merely because all of the parties joined therein have not an interest in all of the matters therein alleged. It is sufficient if each party has an interest in some of the matters in the suit and that all of such matters are connected.

10. *ALTERNATIVE RELIEF—right of complainant to seek.* While a complainant is not entitled to allege two inconsistent states of fact and ask for relief in the alternative, he may state the facts and ask alternate relief according to the conclusions of law which the court may draw therefrom.

11. *GENERAL DEMURRER—when should be overruled.* Where a bill in equity sets out various claims to the interposition of the court, a general demurrer to the whole bill will be overruled if any of the claims afford a proper case for the jurisdiction of the court.

Bill in chancery. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

Statement by the Court. April 28, 1902, appellant filed a bill in the Circuit Court of McLean County against A. E. DeMange, the Bloomington & Normal Railway, A. E. DeMange, as president, and J. F. DeMange, as secretary of said Bloomington & Normal Railway. Afterwards, on May 31, 1902, he filed an amended and supplemental bill in said cause, adding as a defendant the Bloomington Electric Light Company. Demurrers were sustained to this amended and supplemental bill, and on January 22, 1903, he filed in said cause an amended and supplemented amended and supplemental bill, adding as defendants J. F. Evans,

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John Eddy, the City District Heating Company, the Bloomington & Normal Railway Electric & Heating Company, and the Thompson, Tenny & Crawford Company. Demurrers were sustained to the last named bill, appellant stood by the bill, and decree was entered dismissing the bill for want of equity. The case is here on appeal from that decree.

By the amended and supplemented amended and supplemental bill, it is averred, in substance, as follows: That on May 31, 1898, A. E. DeMange, one of the defendants hereinafter named, entered into an agreement with George McIntosh, John Eddy, J. F. Evans and complainant, whereby said DeMange was to purchase for himself and said McIntosh, Evans, Eddy and complainant, to be owned by them in equal parts, an undivided half interest in all the property, rights and franchises of the Bloomington City Railway, at sale thereof to be made on said date, by the master in chancery of McLean County; that in pursuance of said agreement, said DeMange did, on May 31, 1898, in conjunction with one John Graham, who purchased the other undivided half of said property, purchase at said master's sale, an undivided one-half of the property aforesaid; that thereupon and with a view to conveying thereto the property so purchased at said sale, the Bloomington & Normal Railway, a corporation (hereinafter for brevity designated herein as the Railway), was organized with a capital stock of \$250,000, divided into 2,500 shares of \$100 each, and 1,250 of said shares were subscribed for by said A. E. DeMange, said subscription being made by said DeMange for the equal benefit of himself, said Evans, McIntosh, Eddy and complainant, and 1,250 of said shares were subscribed for by said Graham; that the corporate organization of said Railway was completed June 17, 1898, and thereupon said DeMange and said Graham conveyed to said company the entire property purchased by them at the master's sale aforesaid, and in consideration each received in his name 1,250 shares of the capital stock of said Railway, and \$67,500 of first mort-

gage bonds upon all the property of said company; that on June 30, 1898, a written agreement was entered into by and between said DeMange, McIntosh, Eddy, Evans and complainant, which, after reciting that DeMange had purchased at master in chancery's sale May 31, 1898, under the decree of the Circuit Court of McLean County, Illinois, an undivided one-half interest in all the property, rights and franchises theretofore belonging to the Bloomington City Railway, provides, in part, substantially as follows: That DeMange, having conveyed to the Bloomington & Normal Railway his entire undivided one-half interest in said property in exchange for 1,250 shares of railway capital stock, par value \$125,000, and for \$67,500 of the first mortgage bonds of said Railway would assign to said McIntosh, Eddy, Gray and Evans, each 250 shares of the said capital stock of the said Railway, and assign to the said McIntosh, Eddy, Gray and Evans each an undivided one-fifth interest in said bonds; that the said stock and the said bonds were to be deposited in a bank in the city of Bloomington, to be selected by a vote of three-fifths of the parties thereto, to be held by the said bank, subject to the written order signed by not less than three-fifths of the parties thereto; the said stock and the said bonds so to be held by the said bank as a guaranty, security, or pledge to each of the parties thereto, that the following described notes should all be paid either at their maturity or at the end of any extension that might be procured, and that no one of the parties thereto should be burdened with the payment of more than his one-fifth share thereof: One note signed by George McIntosh and Helen McIntosh for \$15,000; one note signed by McIntosh, Gray and DeMange and indorsed by Eddy and Evans for \$7,500; one note signed by Evans, McIntosh, Gray, Eddy and DeMange for \$15,000; one note signed by Eddy, Gray and McIntosh and indorsed by DeMange and Evans for \$7,500; one note signed by Eddy, Gray, Evans, McIntosh and DeMange for \$15,000; one note signed by Eddy, Gray, Evans, McIntosh and DeMange for \$7,500.

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That when said certificates of stock and bonds were so deposited in bank for the purpose aforesaid, the same might be withdrawn from the said bank upon the said written order signed by three-fifths of the parties thereto, but only for the purpose of depositing the same in some other bank for the purpose hereinbefore set forth, or for the purpose of selling the said bonds and devoting the proceeds of such sale to the payment of the said notes, or for the purpose of using the said bonds as collateral security with which to procure extensions of the said notes until the same could be paid; and when the said notes, or any extensions thereof, were fully paid, then the said bonds, or what might be then left of them, should be equally divided among the parties thereto, and the said certificates of stock should be delivered to one of the parties to be selected by four of the five parties thereto, the said stock to be held by the party so selected, for a period of ten years, in trust for the others, and voted as a unit at all annual and special meetings of the stockholders of said corporation, upon all questions arising at such meetings, as four-fifths of the said parties thereto should direct in writing; and in case four of the parties thereto could not agree as to how said stock should be voted, then the two of said parties failing to agree with the other three, should offer their stock for sale to the other three parties in the manner thereafter provided; and in case said three parties should fail to purchase the stock of the said two parties in the manner thereafter provided, and within the time thereafter limited, then each of the parties thereto should vote his share of said stock at the first stockholders' meeting thereafter, as he individually saw fit; provided, each of the parties thereto pledged himself in such case to vote all his stock for the election of each of the parties thereto for director, or for so many of them as were then stockholders; and in case the said two parties so failing to agree with the other three, refused so to offer their stock to the said three, then the said three parties should control the voting of all of said 1,250 shares of said stock at the first meeting thereafter held; and each

of the parties thereto further pledged himself that he would not pledge, encumber or sell his said one-fifth of said stock during the said period of ten years, except in the manner hereinafter set forth; it being the intention of each of the parties thereto, and each of the parties thereby agreed to keep his share in the said stock during the said period, for the mutual benefit of himself and the other parties thereto, so that they, the said parties, should not in any manner lose the control and management of the property of the said railway; that in case any one of the parties thereto should at any time during the said period of ten years, desire or be required, as above set forth, to dispose of his one-fifth of said stock, then, if the said stock should have a market value, he should offer his share of the same to the other parties thereto, in writing, addressed to them all, at said market price; and if the said market price were not paid to him by the other parties thereto, or some one or more of them in case all did not desire to purchase, within thirty days after such offer, he should be at liberty to sell the same to any one, and the same should in that case be delivered to him. If the said stock at said time had no market value, the value of the same, on the day of the said offer, should be agreed upon, and if no agreement could be made, then the said value should be determined by each party thereto writing his name and opposite thereto his estimate of its value, not exceeding par, and one-fifth of the sum of the five estimates should be agreed upon as the value of said stock, and the same, unless said offer to sell was withdrawn in writing, should be paid to the owner thereof within thirty days of his said offer to sell the same, by one or more of the remaining parties thereto in case all did not desire to purchase, and in default of such payment the same should be delivered to him and he should be at liberty to sell the same to any one.

That in case it became necessary or expedient for less than the whole number of parties thereto to pay more than their proportion of the amount named in said notes, then said parties so paying should have a specific lien upon the

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interest or interests of the other, or others, in said stock or bonds, or both, as the case might be, to secure them for such payment in excess of their own shares of the debt evidenced by said notes, and such interest, or interests, in the said stock or bonds, or both, might be sold at the expiration of six months thereafter at its or their market value, if it or they should have a market value, and if not, then such value should be agreed upon, and if no agreement could be made, then such value should be determined by each party thereto writing his name, and opposite thereto his estimate, not exceeding par, of the value of said stock, or of said bonds, as the case might be, and one-fifth of the sum of said five estimates should be agreed upon as the value of the said stock or bonds, or both, as the case might be; and the said parties thereto so making the said payment or payments, should have the right, for a period of thirty days thereafter, to take the said stock or the said bonds, or both, as the case might be, at the price so fixed; and in case none of the said parties should take the same within said thirty days, then the same might be sold thereafter to any other party or parties, provided that the party or parties thereto owning said stock might redeem the same at any time before sale by paying the amount of the liens thereon to the party or parties entitled to the same.

The bill further avers that afterwards all said first mortgage bonds in said written agreement mentioned were sold to other parties, and all said promissory notes in said agreement mentioned, and the \$6,000 provided to be paid to said DeMange, were fully paid and discharged, and 250 of said shares were fully paid for by complainant, and in pursuance of said contract said DeMange assigned to said Evans, McIntosh, Eddy and complainant, each 250 shares of said 1,250 shares of said stock subscribed for by said DeMange, as aforesaid; that after the sale of said bonds and the payment of said promissory notes, the said shares of stock, including complainant's said shares, were delivered to said DeMange, in the manner and for the uses and purposes recited in said agreement.

That in June, 1901, said DeMange, Eddy and Evans purchased all the shares subscribed for by said Graham, and also all the shares of said McIntosh, and released and discharged said McIntosh from all liability and obligation under and in connection with the said contract; that by means of the purchase aforesaid, said DeMange, Eddy and Evans became and still are the owners in equal parts of all the stock of said railway except the stock of complainant; that complainant had no knowledge of such purchase until after the same was consummated, and did not participate in any way in any of the proceedings by which such purchase was brought about; that in the purchase of said stock of said McIntosh, said DeMange, Eddy and Evans did not require said McIntosh to offer his stock in the manner provided for by the terms of said written agreement, but without any regard thereto, said McIntosh asked and was paid for his said stock by said DeMange, Eddy and Evans, \$22,500 in the ordinary way of bargain and sale; that even though the written agreement aforesaid had been binding upon complainant in the matter of leaving control of his shares in DeMange for the period of ten years, which he does not admit, yet the release of said McIntosh from the terms of said agreement, worked a discontinuance and annulment of the trust, if any, under which the shares and interest of your orator in said railway had theretofore been held and controlled by said DeMange; that since the release and withdrawal from said agreement by said McIntosh, the method provided therein for your orator to sell or obtain personal control of his said shares and interest, or to have a voice in determining how they shall be voted, is destroyed and rendered impossible of operation.

That on February 1, 1902, when he was about to depart from Bloomington, Illinois, to go to China, complainant offered to sell his stock to said DeMange, Eddy and Evans, or to either of them, but that although said stock was at said time fairly worth ninety per cent. of its face value, the highest offer he could obtain from any or either of said persons, was twenty per cent. of such face value, which

offer your orator declined to accept; that in said attempted sale no regard was had to the method provided in said written agreement, as it was assumed by all concerned that it was no longer practicable to follow such method; that when it was found he could not agree with said DeMange, Eddy and Evans, or either of them, as to selling to them, or either of them, his said stock, complainant began negotiations, with their knowledge, consent and acquiescence, to sell his said stock to one Willson, but while such negotiations were pending, said DeMange, with a fraudulent design of preventing complainant from selling his said stock to said Willson, stated to said Willson that complainant was not the owner of any stock in said company; that he only had a contract interest in some of the stock, and would have to have the consent of all the parties to the syndicate contract to sell his interest, and that while he, DeMange, would not have any objection to said Willson's acquiring complainant's interest, he feared it might not be satisfactory to the other members of the syndicate, and that they might make it unpleasant for said Willson if he should buy complainant's stock, and that because of such statements and representations said Willson declined to purchase complainant's said stock.

That on February 6, 1902, on the eve of his departure for China, where he expected to be detained by business for a long time, in order to obtain his rights and protect his interest in said company, complainant appointed and empowered Thomas C. Kerrick, his attorney in fact, to demand and receive a certificate of his said 250 shares of stock; that on February 15, 1902, said Kerrick exhibited to said DeMange said power of attorney and verbally requested said DeMange to deliver to him, as attorney in fact for complainant, a certificate of said shares in complainant's name; that at that time said DeMange did not refuse to deliver such certificates, but asked for time to consider the matter; that from time to time thereafter said DeMange, still not saying whether or not he would deliver said certificate to said Kerrick, asked said Kerrick for further time

to consider the matter; that on March 28, 1902, said Kerrick, as attorney in fact, and also as attorney at law and agent for complainant, made demand in writing of said DeMange, individually, DeMange as president, Evans as secretary of said Railway, and the said Railway, forthwith to duly issue, or cause to be issued, to and in the name of complainant, in due and proper form, a certificate showing complainant's full and complete ownership of 250 shares of stock of said Railway, and that said certificate be delivered to said Kerrick; that said DeMange, said DeMange as president and said Evans as secretary of said Railway, and said Railway, refused, and still refuse, to comply with said demand, and said DeMange, as the nominal holder of said stock of complainant, asserts and exercises full control and management of said stock the same as if it were his own, and denies any right in complainant in any wise to control or direct in respect to his said stock, and asserts the right and declares his intention to continue in such course with regard to said stock.

That since the appointment of said Kerrick as his attorney in fact, and after notice to defendants of such appointment, the defendants, without notice to complainant, or his said attorney in fact, of any intention so to do, made a pretended and illegal increase of the capital stock of said Railway, from \$250,000 to \$600,000; that other than as to the fact that said alleged increase of capital stock was made without the knowledge or participation of complainant, or his said attorney in fact, complainant and his said attorney in fact were ignorant of the steps taken by defendants to make such pretended increase of stock, until May 6, 1902, when a certificate of the proceedings therein was filed in the recorder's office of McLean County, Illinois; that by his said attorney in fact, complainant has requested of said defendants leave to examine the records and books of said Railway, in so far as they relate to said alleged increase of capital stock, but such request has been refused by said defendants, and said defendants wholly refuse to furnish complainant, or his said attorney in fact, any information

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whatever concerning said alleged increase of capital stock, other than a verbal statement that the capital stock of said Railway has been increased to \$600,000, and your orator has no information other than as obtained from the records in said recorder's office.

That no certificate of the vote or proceedings by which said alleged increase of stock purported to be effected, was filed with the recorder of deeds of McLean County, Illinois, until nearly a month after such alleged vote was taken, and no notice of a meeting of the stockholders of said Railway to vote upon the question of increasing the stock of said company, or that said stock had been increased, was published in any newspaper, as required by the Statutes of Illinois, and neither complainant nor his said attorney in fact, in any way, received such notice, nor in any way assented or consented to such illegal increase of capital stock; that even though said written contract was and is valid and binding, which complainant does not admit, and that under the same the said DeMange had the right and power in pursuance of said contract, to vote complainant's said stock in said alleged proceedings to increase the capital stock of said company, which complainant does not admit, yet, under the said contract, complainant was and is entitled to direct, in writing, together with the other parties to said contract, how said DeMange shall vote said stock, and in order to exercise such a right, is entitled to notice of all meetings at which a vote of said stock is in contemplation. And well knowing this, said DeMange, Eddy and Evans, as individuals, and as president, manager and secretary, respectively, of said Railway, and sole owners of the stock of said Railway other than complainant's stock, unlawfully conspired and confederated together to prevent, and did prevent complainant from obtaining any knowledge concerning said increase of stock, or of any vote of his stock in that connection, until long after such alleged increase of stock had been made, and by reason of the premises, complainant alleges that said pretended increase of capital stock is invalid and void and that defendants cannot lawfully issue or cause

to be issued, any part of such alleged increase of capital stock, and that the same, if issued, will be invalid and void.

That after the filing of the original bill in this case, there was filed for record on the 6th day of May, 1902, in the recorder's office of said McLean county, a certain alleged certificate of a pretended and illegal increase of the capital stock of said Railway, from \$250,000 to \$600,000; that for the reasons hereinbefore stated, neither complainant nor his said attorney in fact, had any knowledge or information whatsoever concerning the manner in which said alleged increase of stock was made, until said alleged certificate was filed; that said purported action on the part of said defendants, was had and taken secretly and without notice of any kind whatsoever to complainant, or to his said attorney in fact, and the filing of said alleged certificate was delayed as above stated, for the space of almost a month, for the purpose and with the fraudulent intent of preventing complainant and his said attorney in fact from obtaining any knowledge or information of said purported action; that in and by said alleged certificate, said DeMange unlawfully represented himself as being the owner of and as having voted 1.666 $\frac{2}{3}$ shares of said capital stock, when in truth and in fact 250 shares of said stock so claimed and alleged to have been voted by him, belonged to complainant, and were of right under control of him and his said attorney in fact.

That after the filing of his said original bill, there was filed for record, on the 6th of May, 1902, in the county recorder's office of said county, a certain alleged certificate concerning the "enlarging of the object" of the Bloomington Electric Light Company, a corporation organized and doing business under the laws of Illinois, hereinafter designated as the Electric Company; that said increase of the capital stock of said Railway, and said purported action concerning the enlarging of the object of said Electric Company, were taken and had by said defendants for the purpose of furthering and accomplishing a certain unlawful scheme or plan against the interest and desire of complainant, and without regard to his rights in the premises, which

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said unlawful scheme and plan contemplated, among other things, the so-called consolidation of the said Electric Company with the said Railway.

That after the filing of his aforesaid original bill, there was filed for record, on May 10, 1902, in the county recorder's office of said county, two certain alleged certificates purporting to show certain alleged action on the part of the stockholders of said Railway, and of the said Electric Company, whereby the said Electric Company was "consolidated" with said Railway; that until the filing of said last mentioned certificates, neither complainant nor his said attorney in fact had any notice, knowledge or information whatsoever, concerning said alleged consolidation, and that no notice of the meeting of the stockholders of said Railway to vote upon the question of consolidating the Electric Company with said Railway, or that said purported consolidation had been effected, were published in any newspaper, as required by the Statutes of Illinois, and complainant never in any way received such notice, nor in any way assented or consented to such alleged consolidation; that said purported action on the part of said defendants was taken secretly and without notice of any kind to complainant or to his said attorney in fact, for the purpose and with the fraudulent intent of preventing complainant and his said attorney in fact, from obtaining any knowledge or information of said purported action; that in and by said alleged certificate of consolidation, said DeMange unlawfully represented himself as being the owner of and as having voted 1,666 $\frac{2}{3}$ shares of the capital stock of said Railway, when in fact 250 shares of the said stock so claimed by said DeMange, and alleged to have been voted by him, belonged to complainant and were of right under control of complainant and his said attorney in fact.

That said Railway and said Electric Company were not, on said 5th day of May, 1902, nor had they been at any time prior to said date, "corporations of the same kind, engaged in the same general business;" that by means of the premises, and because of the facts hereinafter stated and

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shown, said purported consolidation was and is invalid and void.

That said DeMange, who is, and was, at and before the time of the said alleged increase of the capital stock of the said Railway, and alleged consolidation of the Electric Company with said Railway, the president of both said companies, was the owner of the entire capital stock of said Electric Company, the one share voted, as aforesaid, by H. M. Kennedy, being in fact owned by said DeMange; that the aforesaid alleged increase of capital stock of said Railway was manipulated and brought about by said DeMange, and the said Evans and Eddy, who are wholly controlled and dominated by said DeMange as a part of a scheme to enable said DeMange to consolidate said Electric Company with said Railway, and to sell the property of said Electric Company to the said Railway at a fraudulently exorbitant price; that the price at which the property of said Electric Company was, under said scheme, sold and transferred to the Railway, is grossly and fraudulently excessive; that the said DeMange well knew that complainant would not consent to such sale and would oppose legal proceedings thereto if aware of such an attempt, and for that reason, with others, designedly and fraudulently, in conjunction with said Eddy and Evans, prevented complainant and his said attorney in fact from obtaining any knowledge of such proceedings until long after it had taken place.

That on May 31, 1902, after the filing of complainant's original bill and amended and supplemental bill herein, there was filed for record in the office of the recorder of said county of McLean, an instrument purporting to be a conveyance of the entire property of said Electric Company to said Railway, subject to all liens upon the same and all indebtedness due and owing by the grantor; that said instruments were so executed in pursuance of the fraudulent and collusive scheme aforementioned and described, and with a view to obtain by mortgage of the properties so consolidated, a large sum of money, ostensibly to be used for the exclusive extension, improvement and

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betterment of the consolidated property and the payment of indebtedness upon the property existing prior to the alleged consolidation, but in fact to be used in large part for the payment to said DeMange of the fraudulently exorbitant price at which the property of said Electric Company was sold to said Railway, as aforesaid, and also for unlawful division between said DeMange, Evans and Eddy.

That on May 19, 1902, there was filed for record in the office of the recorder of said county of McLean, instruments showing an alleged change of name of said Railway to that of Bloomington & Normal Railway, Electric & Heating Company, and enlarging of the objects of said company so that it should have power to provide, lease and operate street railways, and to hold all franchises and property necessary therefor; to manufacture electric current and illuminating gas; to furnish for public or private use, any or all of the articles or commodities of light, heat and power, and to acquire, own, buy, sell and deliver generally all apparatus and appliances requisite or proper to be used for such purposes; that such proceeding was had without any notice whatsoever to complainant or to his said attorney in fact; that neither complainant nor his said attorney in fact had any knowledge of such proceeding until said filing of said instrument, and that said DeMange, Eddy and Evans fraudulently schemed and designed to prevent, and did so prevent, complainant and his said attorney in fact from knowing anything of such procedure until long after it was had.

That on June 22, 1902, there was filed for record in the recorder's office of McLean county, a mortgage upon all the property of the said Railway and the said Electric Company under the alleged name of the Bloomington & Normal Railway, Electric & Heating Company (hereinafter designated as the Consolidated Company), to secure \$600,000 mortgage bonds of said date; that neither complainant, nor his attorney in fact, had any notice or knowledge of any of the proceedings relative to the giving of said mortgage, or that it was in contemplation to give such mortgage, until same was filed for record, as aforesaid; that said

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DeMange, Eddy and Evans fraudulently schemed and designed to prevent, and did prevent, complainant and his said attorney in fact from obtaining any knowledge of any vote or other proceedings relative to the giving of such mortgage, until same was filed for record.

That \$500,000 of said bonds were, on June 10, 1902, placed with the Thompson, Tenney & Crawford Company, a bond brokerage corporation doing business in Chicago, Illinois, for sale, under an arrangement by which it was to advertise and hold itself out to the world as the individual purchaser of said bonds, having them for sale as its own, but under which arrangement, in fact, said company held said bonds to be used merely as brokers for the mortgagor, but with power to raise money upon them for the mortgagor as collateral, and to sell said bonds as soon as practicable and repay itself the money so raised upon said bonds as collateral; that complainant is informed and believes and charges, that approximately \$475,000 has been received by the mortgagor from the pledge and sale of said bonds, about \$260,000 of which was applied directly by said brokerage company to the payment of a prior mortgage given by the Railway, and of the \$215,000 balance, the major part has been, as complainant believes and charges, appropriated by said DeMange in payment for the property of said Electric Company, as aforesaid, and a part thereof in an unlawful division of the same between the said DeMange, Eddy and Evans, as aforesaid; that with the knowledge and consent and connivance of said mortgagor company, through said DeMange, Eddy and Evans, its president, manager and secretary, respectively, the Thompson, Tenney & Crawford Company, in a printed circular put in general circulation throughout the country, soliciting purchasers for a part of said bonds yet unsold, represent and set forth that the Bloomington & Normal Railway, Electric & Heating Company, comprises a consolidation which was effected early in June, 1902, of the Bloomington & Normal Railway, the Bloomington Electric Light Company, and the City District Heating Company

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(hereinafter designated as the Heating Company), all of which companies are incorporated companies, incorporated under the laws of the State of Illinois; that both complainant and his said attorney in fact being refused access to the books and records of the said Railway and of any company alleged to have been consolidated with it, and of said alleged consolidated company, are in ignorance of what may have been done or attempted in the way of consolidation of said Heating Company with said other companies, other than as advised by said statement in said circular; that there is no record either upon the records of said county, or in the office of the secretary of state of the State of Illinois, of any consolidation of said Heating Company with said other two companies, or either of them; that no more than two incorporated companies can lawfully be consolidated in one, under the laws of the State of Illinois in respect to the consolidation of incorporated companies; that the publication and circulation of the circular aforesaid, is a fraud upon the public and complainant, and that it may, and probably will, involve said Railway in expensive litigation with the purchasers of said bonds under such misrepresentations, and may involve an action for the forfeiture of the charter of said company, at the suit of the State of Illinois, to the damage of complainant with respect to his said stock, and that the said Thompson, Tenney & Crawford Company and the said DeMange, Eddy and Evans should be restrained by injunction from further issuing and circulating said circular, or other circular and advertisement containing the representations aforesaid; that for the reasons aforesaid, complainant is in ignorance as to whether or not some sort of a pretended consolidation has been made by which the property of said Heating Company has been made a part of said consolidated company; that the said A. E. DeMange is the president and sole owner of said Heating Company, and complainant, because of the representations contained in aforesaid circular, has reason to believe, and does believe, and so charges, that said DeMange has made some sort of an unlawful sale or transfer of the

property of said Heating Company to the said Railway, or to said alleged Consolidated Company, in fraud of complainant's rights in the premises, and as to such transaction complainant expects to prove that such sale is in fraud of complainant's rights in the premises and void as to him.

That at the time when complainant endeavored to sell his stock, as aforesaid, and ever since, said DeMange, Eddy and Evans have unlawfully conspired and confederated together to prevent complainant from selling his said stock, or from having any voice or control with respect to it, and that they are now asserting and claiming that he has no interest or right whatsoever in said stock, or in said Railway consolidated with another or other companies; that said DeMange in particular, although admitting that he came into possession of complainant's stock as trustee for complainant with respect to said stock, now falsely and fraudulently claims to be the owner absolutely of said stock, upon a false and fraudulent pretense that complainant's stock was a gift from said DeMange to complainant; and, among other reasons for not delivering complainant's said stock to him or to his said attorney in fact, claims that said agreement between himself and complainant, whereby complainant is to receive said stock, is without consideration moving from complainant, and therefore, not enforceable against the said DeMange or against said Railway, or against said alleged Consolidated Company; that at the time and ever since the effort of complainant to dispose of his said stock, as aforesaid, it has been the settled and constant design and purpose of said DeMange, Evans and Eddy, to ignore all right of complainant in said Railway, and to prevent him from obtaining any knowledge whatsoever of any of the acts or business or plans of said Railway, or of themselves, or either of them, with respect to such acts or plans or business; that during all said time it has been the design and purpose of said DeMange, Eddy and Evans, and they have constantly acted and cooperated in the furtherance of such design and purpose, to "freeze out" complainant from his said interest in said Railway, or to force him

to sell his said stock to them, or some of them, for a nominal price; all of which has been, during all said time, well known to said Railway, and any and all incorporated company, or companies, combined or consolidated with said Railway, through the president and all other officers and stockholders, except complainant, of each and all of said companies; that each and all of said companies, by all the officers and stockholders of the same, excepting complainant, have, as companies, all along acted and cooperated with said DeMange, Eddy and Evans, in all the acts and doings aforesaid, in the furtherance of the fraudulent and unlawful designs and purposes aforesaid.

That as one of the means to render complainant's said stock worthless, or nearly so, and to force him to sell his said stock to the said DeMange, Eddy and Evans, or some of them, at a nominal price, or to abandon his interest in said Railway, said DeMange, Eddy and Evans, with the cooperation of said companies, through the control of said companies by said DeMange, Eddy and Evans, procured the mortgage aforesaid, to be made for an amount equal to or in excess of the entire value of the said mortgaged property, and diverted a large portion of the proceeds of the said mortgage to the payment of the fraudulently exorbitant price of the property of said Electric Company, and to an unlawful division between said DeMange, Eddy and Evans, as aforesaid, and by said means, if allowed to prevail, complainant's said stock would, in fact, be rendered practically valueless; that said diversion of the funds procured by means of said mortgage, is unlawful and is a fraud upon complainant.

That said Railway and the alleged Consolidated Company, being officered and owned entirely, except as to the interest of complainant, by said DeMange, Eddy and Evans, who are parties with complainant to the aforesaid written agreement, are charged with the full knowledge of all limitations upon the powers and rights of said DeMange, respecting complainant's said stock, and the disability of said DeMange to vote said stock in any meeting or proceeding

of said Railway in disregard of complainant's voice and vote as to how his said stock shall be voted, and without notice to complainant that said stock is to be voted, and that being so charged with the knowledge, the acceptance by said Railway of said vote of said DeMange, with respect to the alleged increase of the capital stock of said Railway, the alleged consolidation, the alleged change of name, and the giving of said mortgage or issuance of said bonds, was and is illegal and void, and of no effect as respects complainant's rights in the premises, and all said alleged acts are void and of no effect.

That said Railway and said Electric Company were not, at the time of said alleged consolidation, and never were, corporations of the same kind, engaged in the same general business; that the franchise granted to said companies by the city of Bloomington and town of Normal, the place of their operation, are entirely distinct and different; that the franchises, and only franchises, granted to said Railway, appertain to street railways only; that those granted to the Electric Company appertain to the furnishing of light only, and that neither of said companies has any franchise other than those granted by said city and said town to said Railway, and those granted to said Electric Company by said city; that said alleged proceedings by which it is pretended that the powers of said Electric Company are enlarged so as to give said company the character and functions of a street railway company, were not had in good faith with the honest and lawful intention of enabling said Electric Company to own and operate street railway, or railways, but were had solely and only for the purpose of giving a colorable right of consolidation to two companies entirely dissimilar in fact and in the meaning of the law concerning the consolidation of incorporated companies, and to further the aforesaid unlawful scheme of said DeMange to sell the property of said Electric Company to said Railway.

Said DeMange, DeMange as president of the Bloomington & Normal Railway, J. F. Evans, J. F. Evans as secretary

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of the Bloomington & Normal Railway, John Eddy, the Bloomington Electric Light Company, the Bloomington & Normal Railway, Electric & Heating Company, The Thompson, Tenney & Crawford Company, and the City District Heating Company are made parties defendant to said bill, which prays that said defendants, A. E. DeMange, A. E. DeMange as president of the Bloomington & Normal Railway, J. F. Evans as secretary of the Bloomington & Normal Railway, and the Bloomington & Normal Railway, be decreed to issue to complainant, in due and proper form, a certificate showing his full and complete ownership of 250 shares of the original capital stock of said Railway, and that they cause to be made, upon the records of the said Railway, entries so as to show fully the complete and effectual transfer to complainant of all title to said 250 shares of the capital stock, and the complete divestiture from said DeMange, of all interest therein or control thereof, and that they deliver such certificate to complainant, or to his said attorney in fact; that the aforesaid written contract between said DeMange and complainant and said Eddy, Evans and McIntosh, be decreed to be of no further binding force or effect as to complainant, or as to the control of complainant's said stock or interest by said DeMange; and that the alleged proceedings aforesaid relative to the alleged increase of the capital stock of said Railway, and shares of such increased stock issued, or that may be issued, the pretended consolidation of the said Electric Company with the said Railway, and alleged proceedings by which the name of said Railway is pretended to have been changed, be decreed to be null and void; and that the said DeMange and the said Electric Company be decreed to repay and return to the said Railway the proceeds received by the said DeMange or the said Electric Company, in consideration of the said alleged transfer and sale of the property of said Electric Company to said Railway; that an accounting may be had to ascertain the amount and kind of such consideration paid or agreed to be paid, and that any agreement to pay any part of such consideration that may yet remain unpaid, be decreed to be

null and void. The bill further prays that in the alternative, if it shall be held that the said increase of the capital stock of the said Railway, and the said alleged consolidation of the said Electric Company shall stand, then in that case, that it be decreed that an accounting shall be had to ascertain the fair and reasonable value of all the property received by the said Railway by means of the said consolidation at the time of the transfer of the same, and what consideration was in fact paid for said property, and that to the extent that the amount in fact paid shall be found to exceed the fair and reasonable value of said property, the said DeMange and the said Electric Company shall be decreed to repay into the treasury of the said Consolidated Company; and that an accounting may be had to ascertain how much money has been received by the mortgagor from the sale or hypothecation of the \$600,000 of mortgage bonds aforesaid, and how much of the money so realized has been applied to the improvement, extension and betterment of said mortgage company, and to the payment of the *bona fide* antecedent indebtedness of said company, and how much thereof has been unlawfully appropriated by said DeMange, Eddy and Evans, as individuals, and that the said DeMange, Eddy and Evans may each be decreed to repay into the treasury of said company the sum that may be found to have been so unlawfully appropriated by him; that the said Consolidated Company issue a certificate in due and proper form, showing complainant to be the owner of 600 shares, or one-tenth of the capital stock of said Consolidated Company, and that said company be decreed to deliver to complainant or to complainant's attorney in fact, Thomas C. Kerrick, the same; that said Consolidated Company, said DeMange, said Evans and said Thompson, Tenney & Crawford Company, be restrained by injunction from advertising and representing that said Consolidated Company comprises "a consolidation of the Bloomington & Normal Railway, the Bloomington Electric Light Company, and the City District Heating Company."

And if it shall be discovered there has been a sale, or an

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attempted sale of the property of the said Heating Company to the said Railway, or to the said Electric Company, or to the alleged Consolidated Company, under color of consolidation with either or both of said companies, or otherwise, that the said sale be decreed to be null and void; that the said DeMange and the said Heating Company be decreed to repay to the said Railway whatever consideration has been received by said DeMange, or by said Heating Company, from the said Railway; or in the alternative, that an accounting be had to ascertain the fair and reasonable value of the property of the said Heating Company, at the time of such sale of its property, and that if upon such accounting it shall be found that the consideration received by said DeMange, or the said company, for said property, was excessive, then, that the said DeMange and said company be decreed to repay into the treasury of said Consolidated Company, whatsoever sum may be shown upon such accounting to have been received by said DeMange, or said Company, for said property, in excess of the fair and reasonable value of the same.

The grounds of demurrer assigned are, first, that complainant has complete remedy at law; second, that the bill is multifarious, in that it seeks to litigate two or more distinct and independent matters in one suit; third, that the bill is devoid of equity; fourth, that complainant relies upon alleged written contract in some portions of the bill, while in other portions denies or refuses to admit its binding force; fifth, that it appears from face of bill that there are necessary and indispensable parties not joined; sixth, that the bill pleads evidence and conclusions; and seventh, that there is no privity between the complainant and defendants DeMange and Evans, as president and secretary, respectively, of the Bloomington & Normal Railway, to enable complainant to call upon said defendants for the relief prayed.

KERRICK & BRACKEN, for appellant.

BARRY & MORRISSEY, JOHN T. LILLARD and SHOPE, MATHIS, ZANE & WEBER, for appellees.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

The general inquiry presented by the various demurrers interposed thereto is, whether the bill here involved states grounds for equitable relief. The primary question to be determined is as to the validity and force of the contract set out in the bill. Appellant urges and argues that the provisions of the same whereby the stock of the Railway Company was to be placed in the hands of one of the contracting parties in trust for the others, for a period of ten years, to be voted as a unit at all stockholders' meetings, upon all questions, as four-fifths of the parties thereto should direct in writing, is in restraint of trade and therefore contrary to public policy and void.

In *Faulds v. Yates*, 57 Ill. 416, where persons owning the majority of the stock of a corporation entered into an agreement that they would elect the directors and determine among themselves as to its officers and management, and that if they could not agree, they would ballot among themselves for the directors and officers, and that the majority should rule, and their vote be cast as a unit, so as to control the election, our Supreme Court held that such an agreement was not void as against public policy and that the parties had a right to combine and thus secure the board of directors and the management of the company. This case was cited, with approval, in *Higgins v. Lansingh*, 154 Ill. 301.

In *Smith v. S. F. & N. P. Ry. Co.*, 115 Cal. 584, an agreement similar to the one in question, was fully considered by the court and held to be a valid and binding contract. In that case three parties intending to purchase a block of stock entered into an agreement as one of the conditions of their uniting in the purchase, that they would vote as a unit for five years, in accordance with the decision of the majority, to be determined by ballot. It was there held

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that an owner of stock cannot revoke an agreement made with other persons as a condition of their joining to purchase a majority of the stock, although the certificates were taken in their individual names, to the effect that the stock shall be voted as a unit for five years as a majority of them should determine by ballot. It was also held that the owners of the majority of stock may lawfully agree to be bound by the will of the majority of themselves in voting the stock, and that the agreement was not illegal as in restraint of trade.

In *Moses v. Scott*, 84 Ala. 608, certain stockholders had formed a voting trust and placed their stock in the hands of four trustees with power to vote the stock as a unit at all meetings, as three of them should think best, or if they failed to agree, as three-fourths of the stock represented should determine, and agreed not to sell their stock so pooled for a period of three years. In that case there was no consideration other than the mutual promise of the several stockholders, and while the court refused to enforce the agreement, it said: "We cannot say there is anything *per se* illegal, in an agreement entered into by and between certain stockholders in a joint stock company, by which they promise to vote together as a unit in all matters pertaining to the government of the corporation. Each member has a clear right to cast his ballot as he pleases, wisely or unwisely, and no other stockholder can control his conduct, or gainsay his discretion. And it can make no difference if several stockholders uniformly vote together, or so vote in obedience to a prior agreement that they will do so. The vote when cast is but the expressed wish of the stockholders, or, at least, must be so regarded, and no other stockholder can be supposed to be injured thereby. To hold otherwise would greatly abridge the voter's right to cast his ballot as he pleases."

In *Hey v. Dolphin*, 92 Hun (N. Y.), 230, the parties were jointly interested in certain shares of stock which had been issued to them in a single certificate, and it was agreed between them that the stock should not be sold or in any

manner disposed of, for a period of ten years, without their joint consent in writing, but should remain as first issued, for the purpose of enabling said parties to prevent the control and management of the company from passing over to persons who might be less qualified to make the business a success and its stock valuable. By the same agreement Dolphin was appointed a proxy to vote the whole of said shares at all regular elections and the proxy was made irrevocable for ten years. In an action brought for the purpose of having the agreement made void and to have a certificate issued to the plaintiff for one-half of the shares, the court held that the agreement was not void or against public policy, saying: "The object and purpose of the agreement as stated in the contract is not in itself vicious, but rather the contrary. It will hardly be claimed that a majority of stockholders may not combine and control an election of directors."

In Beach on Corporations, section 304, it is said: "The owners of shares may enter into agreements as between themselves, to elect the officers of the company and to manage its officers as they or a majority of them may determine, and it is held that agreements of that character are not illegal or void as against public policy, for as was said by the court in a leading case (*Faulds v. Yates*, 57 Ill. 416), their interests are identical with the interest of the minority of the shareholders."

The purposes sought to be accomplished by the provision of the contract under consideration, was to vest and retain for a fixed period the management and control of the enterprise in the persons who originally promoted the same. So long, at least, as each of them retained his original interest and no other rights intervened, the enforcement of the same was proper and practicable. We, therefore, hold that the provision of the contract in question was legal and valid. While "trust voting agreements" have been held to be void, the reasons therefor do not exist in the instant contract.

In *Kreissl v. Distilling Co.*, 47 Atl. (N. J.) 417, the agree-

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ment involved was held to be contrary to public policy and void for the reason that it provided for a possible management of the affairs of the corporation during a fixed period, by the judgment and determination of others than the stockholders, and for the further reason that stockholders who joined therein should have an interest which would not inure to the benefit of those who failed to do so. The court there said: "If stockholders, upon consideration, determine and adjudge that a certain plan for conducting and managing the affairs of the corporation is judicious and advisable, they may, by powers of attorney, or the creation of a trust, or the conveyance to a trustee of their stock, so combine or pool their stock as to provide for the carrying out of the plan so determined upon. But if stockholders combine by either mode to intrust and confide to others—the formulation and execution of a plan for—the management of the affairs of the corporation, and exclude themselves by acts made and attempted to be made irrevocable for a fixed period, from the exercise of judgment thereon, or if they reserve to themselves any benefit to be derived from such a plan, to the exclusion of other stockholders, who do not come into the combination, then, such combination, and the acts done to effectuate it, are contrary to public policy, and other stockholders have a right to the interposition of a court of equity to prevent its being put into operation."

In *Cone v. Russell*, 48 N. J. Equity, 208, an agreement was held void as against public policy by which owners of shares agreed with the owners of other shares to give an irrevocable proxy for five years, empowering them to vote on the shares during that time, in consideration of which the latter parties agreed to so hold the shares as to procure the employment of one of the owners thereof as manager of the corporation, at a specified salary.

In *White v. Tire Co.*, 52 N. J. Eq., 178, all the stockholders of a corporation entered into an agreement among themselves, transferring their shares to a trustee, who should issue to each stockholder an assignable trust certificate for the amount of his stock so transferred. The trus-

tee was required so to vote upon the shares that a majority of the directors should be elected on the nomination of holders of certain certificates, being a minority of the whole number, and that a minority of the directors should be elected upon the nomination of holders of certain certificates, being a majority of the whole number of such certificates. This agreement was held void. In its opinion the court says: "The conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy with a view to upholding the best interests of all the stockholders. The propriety of the object validates the means, and must affirmatively appear."

In *Warren v. Pim*, 55 Atl. Rep. (N. J.) 66, the American shareholders of a New Jersey corporation agreed to the plan of reorganization on the pledge that they should have an equal footing with English stockholders, who constituted the majority. The foreign stockholders, without the knowledge of complainants, created a voting trust to endure for fifty years, during which time the trustee was to have absolute power to vote the stock, subject to revocation of the trust by three-fourths of the stockholders. The result was the control of the corporation by one-seventh of its stock. It was held that the American shareholders could enjoin the carrying out of the trust, they having a right to demand the original judgment of all stockholders in the company, of the company's affairs. The court held that the creation of a pool with iron-clad provisions, and without the knowledge or consent of complainants, gave the defendants an unfair and unjust advantage, depriving complainants of the right to offer to and have the benefit of the individual judgment of the foreign stockholders on any and all matters connected with the policy of the corporation.

It is further urged that the contract is invalid for the want of a consideration. The position is untenable. Not only may a consideration be imported from the fact that the contract was under seal, but an express consideration

appears from the averments of the bill that each contracting party agreed to and did pledge his personal credit and financial responsibility for the payment of a portion, at least, of the funds raised for the financing of the enterprise. We are, therefore, of opinion that the contract was valid and effective when made, and that under the terms thereof, appellant became the owner of a one-fifth interest in the capital stock of the Railway Company, subject to the terms of said contract.

We are further of opinion that the acquirement by DeMange, Eddy and Evans of the McIntosh interest, in the manner averred, was such a clear and so obvious a departure from the mode of procedure provided thereby to be adopted, as to operate as a rescission, by them, of the contract, and to render the provisions of the same, so far as a trust is reposed in DeMange, thereafter inoperative and without force, and to deprive DeMange as trustee of any further right to hold or control appellant's stock. Furthermore, such disregard by DeMange of the terms of his trust, coupled with his subsequent conduct, constituted, in effect, a denial of appellant's rights in the premises, and consequently a breach thereof. It follows from the views expressed, that upon the violation of the contract by the other parties thereto, the trust arrangement was *ipso facto* ineffective, and that as a consequence appellant became and was entitled to demand, receive and control the shares of stock issued to him in the first instance, free from and unhampered by the terms and conditions of the contract in question.

Appellees insist that the averment of the bill to the effect that the purchase by McIntosh was effected in June, 1901, and the failure of appellant to aver a request by him to be allowed to participate in the benefit of the same, or that he complained thereof, until the filing of his bill in April, 1902, show such laches as to estop him from complaining of such violation of the terms of the trust, or insisting that the contract in that particular was rescinded. We regard such contention as without merit. A court of

equity will apply the doctrine of laches in denial of relief only where, from all the circumstances, to grant the relief to which the complainant would otherwise be entitled, will presumptively be inequitable and unjust because of the delay. *Coryell v. Klehm*, 157 Ill. 462.

In the light of the views already and hereinafter expressed, we are unable to say that by the delay of appellant in asserting his right to the unhampered control of his stock it may fairly be presumed that appellees were lulled into doing that which they would not have done, or in omitting to do that which they would have done in regard to the property, had such right been more promptly asserted. *Gibbons v. Hoag*, 95 Ill. 45.

The contention of appellant that because neither he nor his attorney in fact were notified of the several meetings of the stockholders at which the name of the corporation was changed, the objects enlarged, the capital stock increased and the consolidation with the Electric Company had, all of such proceedings were null and void, is equally without force. It does not appear from the averments of the bill that appellant ever was a stockholder of record. If not, he was never entitled to vote at any stockholders' meetings. The bill further shows that the meetings referred to were held under written waivers of notice, signed by all the stockholders of record. The statute was thus substantially complied with. We, therefore, hold that the averments of the bill in this respect are insufficient to warrant a decree declaring the proceedings at the stockholders' meeting referred to, null and void, and the same must, in this case, be held to be valid.

We think the averments of the bill are sufficient to entitle complainant to a decree declaring the contract in question, in so far as it provides for the control of his said stock by DeMange, to be of no further binding force and effect, and requiring said DeMange to transfer to complainant such number of shares of the stock of the Bloomington & Normal Railway, Electric & Heating Company, as it may appear, upon an accounting by said DeMange with

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him, complainant is, in equity, entitled by reason of his ownership of said 250 shares of stock in the Bloomington & Normal Railway. As to the other and further relief prayed, we are of opinion that the bill in its present form is insufficient to entitle complainant thereto.

The averments of the bill to the effect that the property of the Electric Company and the Heating Company were turned into the Consolidated Company at excessive and exorbitant valuations, are clearly insufficient to warrant the relief predicated and prayed thereon, even if such relief could be had in this proceeding. They neither state what the property was worth nor the amount paid for the same. This is also true as to the averment that the consolidation of the Electric and Railway companies was unlawful, for the reason that they were not of the same kind and engaged in the same general business, which, in the absence of any averments as to the kind of business in which said corporations were respectively engaged, are but conclusions of the pleader.

It is urged that the bill is multifarious. By multifariousness in a bill is meant the improper joining in one bill distinct and independent matters, and thereby confounding them; one example of which being the demand in one bill of several matters of a distinct and independent nature against several defendants in the same bill. The objection is confined to cases where the case of each particular defendant is entirely distinct and separate in its subject-matter, from that of the other defendants, for the case against one defendant may be so entire as to be incapable of being presented in several suits, and yet some other defendant may be a necessary party to some portion only of the case started. In the latter case, the objection of multifariousness could not be allowed to prevail. So, it is not indispensable that all the parties have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some matters in the suit, and they are connected with the others. Story's Eq. Pl., sec. 271. When the subject of a suit is single, but different persons

have, or claim, separate interests in distinct or independent questions, all connected with or arising out of the single object of the suit, the complaint may bring such different persons before the court, as defendants; so that the whole object of the bill may be obtained in one suit, and to prevent further unnecessary and useless litigation. Story's Eq. Jur., sec. 534, note. Applying the foregoing rule to the case stated in the bill under consideration, we are of opinion that the same is not multifarious.

The contention that appellant has a complete remedy at law by an action against DeMange for breach of an executory trust, is, in view of what we have said, so clearly untenable as to require no discussion.

The contention that the bill is demurrable because the complainant relied upon the contract in some parts of the bill and denies or refuses to admit its validity and binding force in others, is likewise without force. While a complainant is not allowed to allege two inconsistent states of fact and ask relief in the alternative, he may state the facts and ask alternative relief according to the conclusions of law which the court may draw from them. Story's Eq. Pl., sec. 42, note. A bill in chancery may be formed with a double aspect and the prayer thereof be in the alternative, so that if the chancellor shall decide against the complainant in one view it shall grant him the relief in another. And this is true though the different aspects presented be not consistent each with the other, if each alternative case made by the allegations of the bill entitles complainant to the relief asked by the prayer. *Henderson v. Harness*, 184 Ill. 520.

A number of other grounds of demurrer are urged. Those which we deem material or important are fully covered by the foregoing discussion.

There being equity in the bill, the chancellor erred in sustaining a demurrer to the same for want of equity. Where a bill in equity sets out various claims to the interposition of the court, a general demurrer to the whole bill will be overruled if any of the claims afford a proper case

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for the jurisdiction of the court. *Snow v. Counselman*, 136 Ill. 191.

The decree of the Circuit Court will be reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

A. C. Spitznagle v. F. A. Cobleigh, et al.

1. *CITY COURT—jurisdiction of, in foreclosure proceedings.* The City Court has jurisdiction within the territorial limits of the city of its location to entertain proceedings to foreclose mortgages and may acquire jurisdiction of the parties to such proceedings in the same manner as Circuit Courts.

2. *FORECLOSURE DECREE—what does not affect validity of.* The fact that the mortgagor had, prior to a decree of foreclosure being entered against him, conveyed his title to the property foreclosed, does not affect the validity of the decree.

3. *JURISDICTION—when does not exist to set aside decree after term of entry.* A decree is under the control of the court during the term at which it is entered and may at such time be set aside, or subsequently upon motion made during said term and continued to a subsequent one, but after the lapse of the term of entry without motion to set aside, the decree is final and cannot be set aside by the court.

4. *PLAINTIFF IN ERROR—how status of, to maintain proceedings for review cannot be affected.* The right of a plaintiff in error to prosecute a writ of error cannot be successfully attacked by a mere *ex parte* statement contained in an unverified petition.

Foreclosure proceeding. Error to the City Court of Canton; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the May term, 1904. Affirmed. Opinion filed April 20, 1905.

CHIPERFIELD & CHIPERFIELD, for plaintiff in error.

LUCIEN GRAY, for defendants in error.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This writ of error is prosecuted to reverse a decree of the City Court of Canton, foreclosing a mortgage executed by

plaintiff in error and his wife, upon a certain lot of ground situated in the city of Canton, to secure the payment of a note to defendant in error. The bill was filed to the March term, 1901, of said court. Plaintiff in error, his wife, and Rumsey & Sikemur Co., all of whom were non-residents of the State, were made parties defendant thereto. The only service of process had upon either of the said defendants was by publication, under section 12 of the Chancery Code. A decree of foreclosure and sale was entered at said March term. At the June term following, the master in chancery reported that pursuant to said decree, he had sold the premises in question to one Plattenburg. The sale was thereupon confirmed by the court and a certificate of purchase issued to the purchaser. At the November term, 1901, of said court, defendant in error filed a petition to vacate said decree of foreclosure and sale, alleging that plaintiff in error had, prior to the entry thereof, been adjudged a bankrupt, that one Perkins had been appointed trustee of his estate, and as such trustee had sold the equity of redemption in the mortgaged premises to one Heylin, and that neither said Perkins nor Heylin were made parties to said proceedings, by reason of which the same were void. The City Court thereupon entered a decree finding that the original decree and the sale thereunder were void, and ordering that the same be set aside and annulled; that the certificate of purchase be surrendered by Plattenburg and cancelled; that the complainant have leave to withdraw his note and mortgage and that the suit be dismissed without prejudice.

Plaintiff in error contends that the court had no power to set aside the proceedings at a subsequent term, and that the decree of foreclosure is still in force notwithstanding. He insists, however, that it should be reversed for the reason that the court had no jurisdiction of the person of plaintiff in error; that, being a court of limited territorial jurisdiction, co-extensive only with the corporate limits of the city of Canton, it had no power to send its original process for service beyond the corporate limits of said city;

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that it did not by reason of the attempted service by publication, acquire jurisdiction for any purpose of the person of plaintiff in error; and that each and every step taken in said cause was therefore absolutely void.

Such contention is, we think, without force. The statute provides that city courts shall have concurrent jurisdiction with circuit courts within the city in which the same may be, in all civil cases arising in said city, and that the procedure and practice therein shall be the same as in the Circuit Court, as far as may be. 1 S. & C. Ann. Stat., 1200. It follows that the City Court had jurisdiction to foreclose the mortgage in question, the real estate conveyed by it being situated within the limits of said city. Had the proceeding been one which sought to subject the defendants to the process of the court or to determine their personal rights or obligations—in other words, strictly *in personam*,—personal service upon such defendants within the territorial limits of the city would have been essential. But the proceeding in question, though in form a personal action, was substantially one against the real estate covered by the mortgage. Its sole object was to reach and dispose of the real estate by enforcing the lien of the mortgage. No personal decree for the amount due upon the mortgage indebtedness was sought by the bill to be established or enforced against the defendants. The only object of such substituted service, was to inform the parties interested in the property of the institution of the proceeding, and its nature and object. We regard the service by publication as amply sufficient for the purpose of the proceeding at oar, and the decree of foreclosure rendered therein. Nor can the validity of the decree be affected by the fact, if proven, that prior to its being entered, Spitznagle had parted with his title by reason of his having been adjudged a bankrupt and that his assignee or grantee was not made a party defendant to the foreclosure proceedings. The only effect of such omission was to leave the right of such grantee or assignee in equity, unaffected by the decree. The legal title to the premises passed, notwithstanding, to

the purchaser at the sale under the decree. Walker v. Warner, 179 Ill. 16; Alsup v. Stewart, 194 Ill. 595. The order of the City Court by which it was attempted to set aside the proceedings had at a prior term, is, therefore, null and void for want of jurisdiction in such court to enter the same. The decree was under the control of the court during the term at which it was entered, and might have been set aside or vacated during such term, or subsequently, upon motion made during the term, and continued to a subsequent term, but no steps to that end were taken. After the term had elapsed the court was wholly without power to change the decision, or set aside, vacate, modify or annul the decree. "No error of law of any kind will justify revising or annulling a decree at a subsequent term in a summary way on motion, but relief against it must be obtained by writ of error if the error is apparent on the face of the record, and if not, by bill of review, or bill to impeach the decree for fraud or other sufficient cause." Tosetti Brewing Co. v. Koehler, 200 Ill. 369.

The contention of defendant in error that Spitznagle, by reason of his alleged adjudication as a bankrupt, has no right to prosecute this writ of error, is not before us for determination, there being no proof in the record that he has been so adjudged. The *ex parte* statement to that effect cited in the unverified petition of defendant in error heretofore referred to, and which was filed at a term subsequent to that at which the decree of foreclosure was entered, is insufficient to establish the fact.

We are of opinion that the original decree of the City Court is valid and of full force, and it is therefore affirmed.

Affirmed.

Chicago & Alton Railway Company, et al., v. Lora M. Jennings.

1. **VERDICT**—*when not duty of Appellate Court to disturb.* It is not the duty of the Appellate Court to set aside a verdict and judgment for the reason merely that the evidence seems to be equally balanced, or because it is doubtful whether the preponderance of the evidence is with the party upon whom the *onus probandi* rests, where no material errors of law have intervened and there is nothing tending to show that passion, partiality or prejudice influenced such verdict.

2. **IMPEACHMENT**—*what essential to.* A witness cannot be impeached by showing that he made declarations out of court inconsistent with his testimony, where such witness was not, upon his cross-examination, asked with respect to such alleged inconsistent statements and his attention called to the time, place and person to whom such statements were alleged to have been made.

3. **ERROR**—*when party estopped to urge.* A party cannot complain of an alleged error of the court which is predicated upon a course of procedure adopted by the opposing counsel, where the complaining party pursued a like course.

Action on the case for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

KERRICK & BRACKEN, for appellants; F. S. WINSTON, of counsel.

WELTY, STERLING & WHITMORE, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in case, by appellee against appellants, to recover damages for personal injuries alleged to have been received while she was a passenger upon appellants' railroad. Upon a former trial appellee recovered a judgment for \$4,000, which, upon appeal to this court, was reversed and remanded because of error in the rulings of the trial court upon the evidence and instructions. A second trial resulted in a verdict and judgment for \$2,500, from which the defendant appeals. The former opinion of this

court (114 Ill. App.622) substantially and sufficiently details the pleadings and principal facts in controversy. The grounds relied upon for reversal are that appellee was not injured as the result of the collision; that if she was injured, she knowingly and for a valuable consideration executed a valid and binding release of any and all damages resulting therefrom; and that the court erred in its ruling upon questions relating to the admissibility of evidence and in its instructions to the jury.

It is strenuously insisted and argued that the verdict is contrary to the greater weight of the evidence. The record is so voluminous that to rehearse and discuss the evidence at any length would be to extend this opinion beyond the limits contemplated by the statute, which provides that opinions shall briefly state the reasons for the same. We shall, therefore, refrain from so doing. We have, nevertheless, carefully read, considered and weighed the evidence.

As to whether or not the execution by appellee of the release in question was procured by fraud and covin practiced by the claim agent of appellants, and as to what extent, if any, appellee was injured as the result of the collision, the evidence is exceedingly conflicting, and if it were the province of this court to determine the question from the printed record alone, regardless of the findings of the jury, we should hesitate to hold that the appellee had established her case by the greater weight of the evidence. While under the law as it exists in this State, the Appellate Courts are not bound by the judgments of trial courts and the verdict of juries, and it is their right and duty to reverse the same where, upon consideration of the testimony, it is found that they are clearly against the weight of the evidence (C.C. Ry. Co. v. Mead, 206 Ill. 174), we do not understand it to be the duty of such courts, where no material errors of law have intervened and there is nothing tending to show that passion, partiality or prejudice influenced the same, to reverse a verdict and judgment for the reason merely that the evidence seems to be equally balanced, or because it is doubtful whether the preponderance of the evidence is with the

party upon whom the *onus probandi* rests. It is only where the verdict is clearly or manifestly against the weight of the evidence, that the verdict of a jury, whose duty it is to determine the facts in controversy, should be disturbed. The cold type of the record is impersonal. By its pages the personality of the witnesses is in no way shown. The appearance and demeanor of a particular witness, whether his or her testimony was given in a direct, unhesitating, candid manner, or otherwise, are matters regarding which a court of review is necessarily uninformed. In this respect, one witness appears as well in the record as another. This is not so when a witness is seen upon the stand. His appearance and manner there may be such as to modify his credibility to a greater or less degree. For this, among other reasons, juries are wisely made the judges of the facts and of the credibility of witnesses and the weight to be given to their testimony; subject, however, to the supervisory powers of the trial judges and the Appellate Court, which can be exercised to the limited extent referred to, only.

Appellee's testimony is corroborated by numerous other witnesses, and there seems from the record to be at least an equal amount of equally credible testimony to the contrary. As to which of the respective witnesses testified falsely, or were mistaken in their testimony, we are unable satisfactorily to determine from the record. The jury determined, as indicated by their verdict, that appellee and her witnesses were the more credible and the trial judge has approved their finding. We would, therefore, be unwarranted in holding that the verdict is so clearly and manifestly against the evidence as to require a reversal of the judgment.

Appellants urge that the court erred in not permitting certain witnesses, who were called for the purpose of impeaching Dr. Langstaff, by showing that he made declarations out of court inconsistent with his testimony, to testify, for the reason that the question put to Langstaff did not call his attention to the time, place and person to whom

such statements were alleged to have been made. It is insisted that because the witness was permitted to reply, without objection, to the original question, that a sufficient foundation had been laid to contradict him, no matter when or where such statement was made. We think the court ruled correctly, notwithstanding no objection was made to the original question. The rule that such foundation must be laid is for the protection of the witness as well as the adverse party. "It is but fair to a witness that his attention should be distinctly called to the particular statement he is alleged to have made with the particulars of the time, place and circumstances, that he may have an opportunity of correcting any mistake he may have made before he is impeached. The law will not permit a person to be proved to have committed perjury and leave his character blackened and destroyed, until it appears the statement was deliberately and intentionally made. Such consequence should not follow a want of recollection, misapprehension or even inattention." *Winslow v. Newlan*, 45 Ill. 146.

The court, over the objection of appellants' counsel, permitted several of appellee's witnesses to state what was said to them by the claim agent and the men who accompanied him when the release was presented to such witnesses and the money paid to them. This was error but not of such serious character as to require a reversal of the judgment. Each of said witnesses had testified in corroboration of appellee's statement as to what was said by the claim agent in the presence and hearing of all the passengers, and we are satisfied that the improper testimony referred to did not affect the verdict.

It is also urged that the trial court erred in permitting appellee's witnesses to state what her condition was at the time of the trial as compared with what it was before or soon after the accident. Appellants asked questions of a similar character and cannot now be heard to complain. Other rulings of the court upon the evidence are assigned as error but not argued and therefore waived. No complaint is made in argument as to the instructions.

Forster, Waterbury & Co. v. Peer.

We find no reversible error in the record, and as the verdict is not clearly and manifestly contrary to the evidence, we feel impelled to affirm the judgment.

Affirmed.

Forster, Waterbury & Company v. J. A. Peer.

1. INSTRUCTIONS—*must not assume facts in dispute.* Instructions must not assume the existence of facts in controversy.

2. INSTRUCTIONS—*must be predicated upon the evidence.* Instructions should be based upon the evidence before the jury.

3. INSTRUCTIONS—*should not, as a general rule, contain mere abstract propositions of law.* As a general rule, instructions should not contain mere abstract propositions of law not concretely applied to the cause.

4. WARRANTY—*what sufficient to constitute.* No particular form of expression is necessary to constitute a warranty; it is a question of intention from the words used, the circumstances and the subject-matter.

Action of assumpsit. Appeal from the County Court of McLean County; the Hon. ROLLAND A. RUSSELL, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

RAYBURN & BUCK, for appellants.

LIVINGSTON & BACH, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action by appellants, who are manufacturers of malleable iron castings, against appellee, to recover the sum of \$90.53 alleged to be due them for work done and material furnished in the manufacture of a pattern and a lot of malleable iron nuts, which were intended for use in connection with the bolts which fasten angle bars to rails used on railroads. A trial by jury resulted in a judgment for the defendant, from which the plaintiffs appeal. The nut in question was the invention of appellee and was designed to have a lip thereon, which could be

bent back without breaking, so as to prevent it unscrewing and coming off after being fastened upon the bolt with which it was to be used.

It is insisted by appellee, that at the time appellee ordered the nuts to be made, the agent of appellants, one Forster, verbally warranted that the nuts which were to be made of malleable iron would bend so as to meet the angle-bar without breaking.

When the nuts were made and shipped to appellee, he refused to accept or pay for the same, claiming that they failed to comply with the alleged warranty in that they could not be bent to meet the angle-bar without breaking, and were therefore worthless.

The chief error assigned and argued by appellants is that the court erred in its rulings upon the instructions. The evidence was close and conflicting and, if, therefore, the instructions were erroneous or misleading to the extent that appellants were prejudiced thereby, the judgment must be reversed.

The only evidence upon the question of warranty, as shown by the abstract, is substantially as follows: Defendant testified that he showed Forster a model or drawing of the nut and showed him what was to be done with it; that Forster said that he could make the nut; that witness then asked him if he could make it work to meet the angle-bar; that Forster replied that he could but that he would not guarantee that it would return; to which witness replied that he did not expect it to return, but only to meet the angle-bar; that nothing was said by witness or Forster as to what material was to be used nor was he shown any; that he knew however that plaintiff was a manufacturer of malleable castings.

Forster testified, in substance, that defendant came to his office and showed him the model of a nut, stated that it was a patented article which he controlled; that he had an idea of having them made of malleable iron, and wanted to know if plaintiff could make them; that witness replied that they could if they had the right kind of a pat-

Forster, Waterbury & Co. v. Peer.

tern; that defendant then inquired whether, if made of malleable iron, the lip of the nut would bend to lock it on the rail, whether malleable iron would stand that or not; that witness replied that in his judgment the article would bend to the rail but that if the bolt was tightened or the nut taken off it would break; that he thought they could make a malleable casting that would bend down but that the best way for appellee to do was to have a few made and test them for his satisfaction.

The first instruction given at the request of the defendant was as follows :

“The court instructs the jury that if you believe from the evidence that the material used in the casting furnished to the defendant was not the same as in the sample of malleable iron shown to the defendant when the castings were ordered, and that said castings did not bend to meet the angle-bar when first set in position, then you should find for defendant on that branch of the case.”

The question as to whether appellants warranted that it would make the nuts so that the lips thereon would meet the angle-bar without breaking, is the principal and most important one involved in the case. By assuming, as it does, that there was such a warranty, the instruction took from the jury the determination of a question solely their province to determine. An instruction should not assume, as true, facts which, under the evidence, the jury are to find. *Gundlach v. Schott*, 192 Ill. 509. The instruction was erroneous for the further reason that it directs the jury to find for the defendant if they find from the evidence that the material used in the casting was not the same as in the sample shown to defendant. There is no evidence tending to show that the nuts were made of different material than that of which the sample was composed. Instructions should be based upon the evidence before the jury. *Webster v. Yorty*, 194 Ill. 408.

The second instruction, in substance, tells the jury that if the plaintiff at the time of taking the order for the castings, told the defendant that the lips of such castings when made would bend to meet the fish-plate, and that when

furnished they would not so bend, they should find for the defendant on that issue.

No particular form of expression is necessary to constitute a warranty; it is a question of intention from the words used and the circumstances, and the subject-matter. *Thorne v. McVeagh*, 75 Ill. 81. There must, however, be a positive affirmation, not made as a matter of belief or opinion, for the purpose of assuring the buyer of the truth of the fact affirmed and inducing him to make the purchase, and which is so received and relied upon by the purchaser. *Robinson v. Harvey*, 82 Ill. 58.

Whether the statement made by Forster was intended by him as a warranty and whether appellee relied upon and ordered the nuts to be made on the faith of such statement, were all questions for the jury. *Pars. Cont.*, 580; *Phillips v. Vermillion*, 91 App. 133.

The instructions under consideration take these questions from the jury by telling them, in effect, as a matter of fact, that such statement amounted to an express warranty.

Defendant's fourth instruction is objectionable for the same reason, and for the further reason that it is but an abstract proposition of law. Such instructions frequently tend to confuse and mislead the jury and should seldom, if ever, be given. Furthermore it is erroneous for the reason that there is no evidence tending to show that the plaintiffs had ever manufactured, dealt in or produced nuts of the character of those in question. On the contrary, the defendant testifies that there was no similar nut manufactured.

Numerous objections are urged and argued as to other instructions, some of which are objectionable for the reasons already expressed herein. We are not inclined to extend this opinion by discussing them in detail. The objections to the rulings of the trial upon the admissibility of evidence are not argued and are therefore waived.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

Batman v. Cook.

Willard Batman, et. al., v. Charles H. Cook.

1. **CONSPIRACY**—*when established.* Where it appears that the defendants in a cause pursued by their acts the same object, by the same means, one performing one part, and another, another part of the same, so as to complete it, with a view to the attainment of such object, the jury is justified in the conclusion that they were engaged in a conspiracy to effect that object.

2. **GAMBLING**—*extent of plaintiff's right to recover where declaration charges a conspiracy.* Where, in an action brought to recover gambling losses, the declaration charges conspiracy, the plaintiff is entitled to recover from all of the defendants (the proof being sufficient) the full amount lost, irrespective of who was the winner thereof.

3. **GAMBLING**—*extent of plaintiff's right of recovery where the declaration relies upon the statute and is in trover.* In such a case the plaintiff is likewise entitled to recover his losses, but in order to do so it is essential that the judgment be against the winner thereof.

4. **EXEMPLARY DAMAGES**—*when properly to be assessed.* Exemplary damages are properly assessed where the declaration alleges and the proof establishes a wilful fraud perpetrated upon the plaintiff as the result of a conspiracy.

Action of trover. Error to the Circuit Court of Moultrie County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the November term, 1904. Affirmed upon remittitur. Opinion filed April 20, 1905. Remittitur filed and judgment affirmed May 10, 1905.

R. M. PEADRO, for plaintiffs in error.

E. J. MILLER, for defendant in error.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action by defendant in error against plaintiffs in error to recover money alleged to have been lost by him to them, at gambling. The plaintiff recovered judgment in the Circuit Court for \$800, to reverse which the defendants prosecute this writ of error.

The first and third counts of the declaration are in case, and charge that the defendants, knowing that plaintiff had a large amount of money on his person, agreed among themselves, to furnish to him large quantities of intoxicating liquors for the purpose of getting him intoxicated and

keeping him so, and while so intoxicated, to engage with him at a pretended game of cards and thus take his money from him; that pursuant to such conspiracy, defendant Batman being a saloonkeeper, furnished the liquor; that the other defendants administered the same to plaintiff and intoxicated him; and that while plaintiff was so intoxicated, the defendants tortiously took from plaintiff without any consideration whatever, the sum of \$355, and kept the same, to damage of plaintiff of \$1,500, etc. The second count is in trover and is based upon the Gaming Statute, section 132, chapter 38, R. S. To the declaration the plea of the general issue was interposed.

Plaintiffs in error contend that the evidence is insufficient to support the verdict, that the court erred in its rulings upon the instructions, and that the damages are excessive.

The facts involved, briefly stated, are as follows:

About 8 o'clock on Saturday evening, January 17, 1903, the plaintiff, who was a farmer living in the vicinity, in company with one Swisher, went to the saloon of defendant Harris, in the city of Sullivan. He had been drinking intoxicants and had on his person at the time about \$355. Harris suggested to plaintiff that they go to a saloon kept by defendants Baker and Batman and play a game called "poker." They then went to a small room adjoining the Baker and Batman saloon, where they met defendants Batman and Farney, and at about ten o'clock were joined by defendant Baker; after which Farney, Batman, Baker, Swisher, Randol and plaintiff began to play a game of poker which continued until about four o'clock of the following morning. Farney acted as "banker" for the game, issuing the chips and taking in the money. Baker, Batman and Swisher besides playing took turns in passing whisky to the other players. Harris did not participate in the game but was present and aided in serving the liquor. Plaintiff testifies that the whisky was passed "like water at a school house in the summer time," and that he took eight or ten drinks. There is no evidence showing that

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any charge was made for the liquor, or that any one but plaintiff became intoxicated. At the close of the game plaintiff had lost all the money he had. The evidence further shows that plaintiff was the only one of the party who produced any money during the entire game. The witness Randol, who was called by plaintiff, testifies that when the game broke up along about four or five o'clock in the morning, Farney remarked: "We'll give the suckers \$20 or \$25;" that Baker then handed Harris, Swisher and witness \$20 each, and told them to take plaintiff away so that they could "divide up;" that the understanding was that they would divide even; that either Farney, Baker or Batman told witness that if he was fined for gambling they would pay his fine; that Batman stated they had won \$260 from plaintiff which he was going to divide.

But two of the defendants went upon the witness stand in the case: Baker, who testifies that on the evening in question he left the saloon at closing time and did not return until 3:30 in the morning, when he ordered the parties playing poker to leave; and Harris, who merely denied that he suggested to plaintiff before going to the saloon that they play poker. Neither denied that an agreement existed as charged in the declaration, or the furnishing of liquor to plaintiff, or the division of the money as testified by Randol.

We are of opinion that the foregoing evidence, which was not seriously controverted, fully sustains the first and third counts of the declaration. That the facts and circumstances proved warranted the jury in finding that the common purpose of the defendants was to induce plaintiff to drink to intoxication, and while he remained in that condition, to obtain his money under the pretext of a game of poker.

In *Greenleaf on Evidence* (vol. 3, section 92), it is said: "The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed to terms, to have that design, and to pur-

sue it by common means. If it be proved that the defendants pursued by their acts, the same object, often by the same means, one performing one part, and another, another part of the same so as to complete it, with a view of the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object. Nor is it necessary to prove that the conspiracy originated with the defendants, or that they met during the process of its concoction, for every person entering into a conspiracy or common design already formed, is deemed, in law, a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design."

If it was proved that the defendants in the case at bar, pursued by their acts, the same object, by the same means, one performing one part, and another, another part of the same, so as to complete it, with a view to the attainment of such object, the jury was justified in the conclusion that they were engaged in a conspiracy to effect that object. *Ochs v. People*, 124 Ill. 399.

As we have said, there were two counts in the declaration based upon the charge of conspiracy, and one in trover based upon the statute. In assessing the damages in the event of a recovery upon the former, what each defendant may have won or lost in the game was immaterial. Plaintiff was entitled to recover the full amount taken from him by the defendants through, by means of, or as the result of the conspiracy. The gist of the action upon which these counts are predicated is the formation and accomplishment of an unlawful conspiracy to deprive plaintiff of his money by unlawful means. The gist of the trover count is the violation of the statute making gaming unlawful and providing that any loser at gaming may recover from the winner the amount so lost. If a conspiracy existed and was consummated as claimed, which we think sufficiently appears, it was not necessary, as is contended by counsel, to show that each and every of the defendants actually won any money from plaintiff, nor was it necessary to establish the respective relations of the defendants. If re-

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covery had been sought under the trover count alone, or, as in *Zellers v. White*, 208 Ill. 518, cited by counsel, in assumpsit, it would have been necessary as contended by appellants to have established that appellee lost, and some defendant or defendants won, some definite, fixed sum or sums. In the case at bar, the defendants having cooperated in the unlawful act, are jointly and severally liable for the resultant injury and for all damages sustained. The damages cannot be severally assessed. There can be but one assessment between the several wrong-doers. It sufficiently appears that appellee, as the result of the conspiracy and its consummation, was deprived of the sum of \$355, and that he was actually damaged to that extent. It is insisted that the damages awarded are excessive in any event and unwarranted by the evidence.

The instructions of the court upon the measure of damages are inconsistent and misleading in that they, in stating the same, fail to distinguish between the several counts. By plaintiff's fourth instruction the jury were told, that in the event they found the defendants guilty under the trover count, the measure of damages would be the value of the money converted; and by the fifth, that under the conspiracy counts the damages were "not limited to the exact sum which defendants took from plaintiff." Defendants' first modified instruction tells the jury that before plaintiff can recover he must prove that he "lost his money in a game of cards, and must show the amount alleged to have been lost, and to whom the sum was lost, and that the verdict should be only for the amount so proven to have been lost against the defendant or defendants." By defendants' second modified instruction they are told that before plaintiff can recover in the case, he must prove that the defendants, and each of them, conspired together to and did fraudulently cheat plaintiff out of his money at a game of cards, and that in the event that they found them guilty "the verdict should be only for the amount of money so obtained." The verdict returned by the jury largely exceeds the amount claimed by plaintiff to have been taken from him by the defendants.

It is contended by appellee that the excess of the verdict over the actual damages proved represents exemplary damages under the conspiracy counts. We think it may fairly be assumed that the damages other than actual, were assessed under the authority of plaintiff's fifth instruction. The jury were not, however, instructed upon the question of exemplary damages; they were not told when the same were allowable nor was the term "exemplary" defined or explained. The acts charged in the conspiracy counts were essentially fraudulent and wilful. Exemplary damages were therefore proper to be assessed thereunder, not as compensation to the plaintiff, but by way of punishment to the wrong-doers. The question as to the amount of exemplary damages within reasonable limits, is one for the jury and their finding should not be disturbed, unless the verdict is so excessive as to justify the inference that they were actuated by passion or prejudice. To what extent the amount of the verdict was affected by the lack of full, consistent and accurate instructions as to the measure of damages, is entirely speculative. We are not satisfied that a judgment for the full amount awarded should, under the circumstances, be permitted to stand. The right of plaintiff to recover the full amount of money of which he was defrauded is, however, beyond question. If defendant in error shall, within thirty days after this opinion is filed, remit therefrom the sum of \$445, the judgment will be affirmed for the balance. Otherwise the judgment will be reversed and the cause remanded. A number of other alleged errors are urged. We have considered those not covered by what has been already said, and find that they are not well assigned.

The abstract of the record filed by plaintiffs in error is not such as is required by the rules of this court. It is neither complete nor accurate. Defendant in error was in consequence compelled to supply an additional abstract, the costs of which will be taxed against plaintiffs in error.

Affirmed upon remittitur.

Remittitur filed and judgment affirmed May 10, 1905.

Lott B. Ware v. Bert Souders.

1. INSTRUCTIONS—*must not submit questions of law to jury.* An instruction is erroneous which submits to the jury the question as to what constitutes "ownership." Whether the particular facts relied upon establish ownership is a question of fact, but whether the same constitute ownership is one of law.

2. INSTRUCTION—*when failure to define "actual notice," erroneous.* An instruction is erroneous which contains the phrase "actual notice," and does not define the same, where the jury are likely to be misled thereby.

3. PERSONAL PROPERTY—*what does not establish ownership of.* Possession does not, as a matter of law, establish conclusively the actual ownership of personal property.

Action of replevin. Appeal from the Circuit Court of Macon County; the Hon. W. C. JOHNS, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

JACK & DICK, for appellant.

MILLS & FITZGERALD, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This was an action of replevin by appellant against appellee to recover possession of several horses and wagons alleged to have been taken and wrongfully detained by appellee. A trial by jury in the Circuit Court resulted in a verdict for the defendant, upon which a judgment was rendered and a writ of *retorno habendo* awarded. The plaintiff appeals, and as grounds for reversal urges that the court erred in admitting improper evidence on the part of the defendant and in its rulings upon the instructions, and that the verdict is contrary to the law and evidence.

The defendant pleaded *non cepit, non detinet*, property in himself, and property in one Markwell.

The facts involved, briefly stated, are as follows: Several years prior to the suit at bar, appellant, Ware, purchased of one Cross a dray line business in the city of Decatur, to-

gether with the good will attached thereto. He employed to assist him in the conduct of the business, one Markwell, who had formerly worked for Cross. On June 15, 1904, Ware sold the business to Markwell. Later Markwell sold a one-half interest in, and finally the entire business, to appellee, Souders. It is insisted by appellant that the sale by him to Markwell was upon condition that the title to the property was to remain in him, Ware, until all of certain conditions entering into the contract of sale were complied with by Markwell; that such conditions were never complied with; that defendant, Souders purchased the dray line of Markwell with full knowledge of Markwell's holding and of the fact that Markwell could convey no title to him; that in fact Souders became vested with no title to said property and has never been vested with the title; but that the same remained in him, Ware.

There is a sharp conflict in the evidence upon the questions as to whether or not the sale to Markwell by Ware was conditional and if there was, whether Souders was aware of the fact when he bought the property. As the judgment must be reversed for the errors in instructions hereafter indicated, it will be unnecessary to discuss or weigh the evidence.

The second instruction given to the jury at the request of the appellee was as follows:

"If you believe from the evidence that the witness, Markwell, was in the open, notorious and exclusive possession of the property described in the declaration, from the 15th day of June, A. D. 1903, to March 11, 1904, and that upon said last-mentioned date he sold said property to the defendant, Souders, and delivered possession of the same to said Souders, then under the law the jury could only discharge their duty by a verdict for the defendant, unless a preponderance of the evidence shows said Markwell was not the owner of said property and said Souders had actual notice that said Markwell was not the owner of said property."

The instruction is erroneous in that it submits to the jury the question as to what constitutes ownership; whether the facts relied upon to establish ownership exist, is a ques-

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tion for the jury, but whether the same constitutes ownership is a question of law. The instruction is misleading in that it tells the jury, in effect, to find that Souders must have had *actual* notice that Markwell was not the owner of the property.

What the jury understood by the expression "actual notice" as used in the instruction is exceedingly problematical. They may have readily taken it to mean that Markwell must have had direct and positive knowledge of the fact, or that he received express notice thereof. Such is not the law. If facts and circumstances which would have placed an ordinarily prudent person upon inquiry as to the ownership of the property, were shown by the evidence to have been brought to the knowledge of Souders, notice to him would be inferred. The use of the words "open, notorious and exclusive possession" was also objectionable as tending to lead the jury to believe that such possession was conclusive proof of actual ownership, disregarding the question as to whether such possession was adverse or otherwise. While open, notorious and exclusive possession raises a strong presumption of ownership, it is not conclusive thereof.

Appellee's third instruction is erroneous in that it also requires actual notice to appellee of the alleged conditional sale.

The eighth instruction upon the credibility of witnesses offered by appellant and refused, should have been given. The tests of credibility therein enumerated are but partially covered by appellant's first given instruction.

In view of the conflict in the testimony, the instructions should have been clear, perspicuous and free from uncertainty. Those referred to were ambiguous and misleading. The judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

**Cincinnati, Indiana & Western Railway Company v.
Nathan Ward.**

1. INSTRUCTION—*need not negative matter of defense.* It is not necessary for an instruction to negative matter of mere defense.

2. MEASURE OF DAMAGES—in action for injury to crop by reason of diverting natural flow of water. In such a case the measure of damages is the value of the crop destroyed and not the expense of the removal of the obstruction which was the efficient cause of the injury, where the plaintiff to have removed such obstruction would have constituted himself a trespasser.

Action on the case. Appeal from the Circuit Court of Christian County; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

J. E. HOGAN, for appellant.

J. C. & W. B. McBRIDE, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action on the case. The plaintiff recovered a verdict and judgment in the Circuit Court for \$350, to reverse which the defendant appeals. The declaration, in substance, avers that the plaintiff was in lawful possession of certain described lands and had raised and cultivated thereon a crop of corn; that the defendant wrongfully and unlawfully maintained a certain levy or embankment on the north line of said land with insufficient openings therein to permit the free passage of water, and that the water by reason of such embankment was diverted from its natural course and stood upon said land, thereby injuring thirty acres of growing corn.

The evidence shows that appellee was possessed of a tract of land containing about 100 acres, through which, near the center, the right of way of appellant ran in an easterly and westerly direction; that appellant maintained an embankment or grade through the land of the width of about 16

feet, and from 15 to 18 inches in height; that appellee, in the spring of 1902, planted 45 acres of corn on the south side of said embankment, and that in the latter part of June in said year, a heavy rainfall came, causing the water to collect and remain upon said tract whereby the corn thereon was damaged.

Appellant contends that the verdict is unsupported by the evidence and is manifestly against the weight thereof. It is insisted, and there is evidence tending to show that the tract in question was naturally low and was in fact a basin or pond without drainage, and further that the rain in question was one of unusual severity which would have caused the water to stand on the premises independently of the existence of the embankment. There is also evidence tending to show that the tract in question was naturally well drained; that before the embankment was built the water from rainfalls never stood upon the land longer than from twelve to twenty-four hours thereafter; and that by reason of said rainfall and of the absence of culverts through which the water could pass, the embankment held the water upon the land from ten to twelve days and badly injured the crop thereon.

These questions of fact were primarily for the determination of the jury. We have read and weighed the testimony of the witnesses and are unable to say that the verdict is manifestly against the weight of the evidence. On the contrary, we think it is amply supported thereby.

It is insisted that the only instruction given at the request of the appellee is erroneous in that inasmuch as it calls for an ultimate finding of facts, it should state all the elements necessary to constitute a right of recovery and that it entirely ignores the matters of defense which there was evidence tending to prove. We do not think the instruction is objectionable for the reason suggested. It tells the jury in substance, that before they can find for the plaintiff they must find that the surface water from the lands so grown in corn, in a natural state, flowed from off the lands of appellee to the north; and further that the defendant main-

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tained an obstruction preventing such natural flow, and thereby caused the water to remain on plaintiff's land. That the surface did not naturally flow off the land to the north, but that the land was a pond or basin, and that the embankment did not cause the water to remain on the land, constituted the only defense interposed by appellant. It is not necessary for an instruction to negative matter of mere defense. *Coal Co. v. Rademacher*, 190 Ill. 538.

It is further contended that the instruction does not correctly state the measure of damages; that the measure of damages was not the value of the corn but merely the expense of removing the obstruction. This is not the law. The rule that there can be no recovery for damages which might have been prevented by reasonable efforts on the part of the person injured, does not apply here. Had appellant gone upon the right of way and removed the embankment, or any part of it, he would have been a trespasser. *C., R. I. & P. R. R. Co. v. Carey*, 90 Ill. 514. The instruction correctly stated the measure of damages. Moreover, the fourth instruction given in behalf of appellant, in effect, adopts the theory of which complaint is made.

There is no error in the record and the judgment will accordingly be affirmed.

Affirmed.

Josiah M. Clokey v. The Loan & Homestead Association.

1. **EXECUTION**—*when proof of, should be made in foreclosure proceeding.* Where a bill to foreclose alleges the execution of a bond, mortgage, etc., and the answer denies the same, it is material that proof of such allegations be made, and where the abstract of the record fails to show that the mortgage was acknowledged, the Appellate Court will not search the record to ascertain the fact with respect thereto.

2. **PRACTICE ACT**—*section 33 construed.* This section of the Practice Act, providing in substance that no person shall be permitted to deny upon the trial, the execution of any instrument in writing, upon any "action" which may have been brought thereon, unless the person denying the same shall verify his plea by affidavit, does not apply to suits in chancery.

Clokey v. Loan & Homestead Association.

Bill to foreclose. Appeal from the Circuit Court of Macon County; the Hon. W. G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

HUGH CREA and HUGH M. HOUSUM, for appellant.

REDMON & HOGAN and NELSON & WHITLEY, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a bill in chancery by appellee to foreclose a mortgage upon a lot in the city of Decatur, executed by one Myra Meisenhelter and her husband, to which the mortgagors and appellant, Josiah M. Clokey, the owner of the equity of redemption, were made parties defendant.

The bill alleges that appellee was a corporation organized and doing business under and by virtue of a certain law of the State of Illinois, entitled, "An act to enable associations of persons to become bodies corporate, to raise funds to be loaned to members of such associations," in force July 1, 1879, and various acts amendatory thereto; that by reason of said incorporation under the said acts, the association had power to issue shares of stock of the par value of \$100 each, and to make subscriptions to stock payable in such periodical installments and at such time or times as might be determined by the charter and by-laws; that defendant, Myra Meisenhelter, became a subscriber to eight shares of said association upon which she borrowed the sum of \$300 under the by-laws of the association; that she entered into an obligation in writing, as an evidence of such indebtedness, in and by which she bound herself to pay \$4 monthly as dues upon the said shares of stock, \$4 monthly as interest at the rate of 6 per cent. per annum upon said loan, and also the sum of \$2.40 monthly, being the monthly installment of the premium upon said loan; all of which were to be paid each and every month until the loan, with interest, should have been liquidated under the charter and by-laws of said association; that the obligation contained a provision as to default, and that at the option

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of the association the principal sum might be declared due and payment enforced and recovered at once; that the shares of stock were assigned and transferred to the association as collateral security for the loan, and that the said assignment contained provisions as to a forfeiture of the stock in case of default in the payment of interest and dues on the stock; that further to secure the payment of said loan, said Myra Meisenhelter and her husband executed a mortgage described therein, which contained provisions as to default in any of the payments; that there was a default in the payments due January 2, 1897, which continued for a period upward of six months, and that the association had exercised its option to declare the whole amount of principal and interest to be due.

A joint and separate answer was filed in behalf of all the defendants, denying *inter alia* that a loan was made or that a bond or obligation was given or a mortgage executed; that there was anything due complainant as claimed, or that any default had been made in any payments alleged to be covered by said alleged obligation, and calling for strict proofs as to all matters set forth in the bill.

The cause was referred to the master, who reported adversely to the defendants upon all issues raised by their answer, and further that complainant was entitled to a foreclosure of the mortgage. The chancellor, upon the hearing of exceptions to the master's report, overruled the same and entered a decree of foreclosure. The defendant Clokey appeals to this court.

The allegations of the bill as to the assignment of the stock and the execution of the bond and mortgage securing the same, were material, and having been expressly denied by the answer, should have been proved. No proof of the execution of the mortgage appears from the abstract to have been offered. Had its execution been duly acknowledged as required by law, it could have, under the statute, been introduced in evidence without further proof thereof. Revised Statutes 1903, page 442. The abstract of the record, however, fails to show that it was so duly acknowl-

edged, and it is not our duty nor are we inclined to search the record to learn the facts relative thereto.

Although the mortgage was considered by both the master and the chancellor, it does not appear from the abstract that it was either offered or admitted in evidence.

Furthermore there is no sufficient proof in the abstract as to the execution of the bond or assignment of stock. The witness McGorry, testified that he believed that the signatures thereto were those of Myra Meisenhelter. It was not shown either that he saw her sign the papers, or that he had had any opportunity to become acquainted with her signature, or that in fact he was acquainted with it. No other proof as to the execution of the bond or assignment was made, and they were admitted in evidence over the objection of appellant. Section 33 of the Practice Act, invoked by appellee and which provides that no person shall be permitted to deny on trial the execution of any instrument in writing, upon any "action" which may have been brought, unless the person denying the same shall verify his plea by affidavit, applies only to actions at law and not to suits in chancery. The term "action" is never properly applied to a suit in equity. *Mahar v. O'Hara*, 4 Gilm. 429. The objection that the evidence failed to establish the execution of the bond and mortgage and the assignment of the stock and that the same were improperly in evidence and considered by the master, was preserved by proper exceptions to the master's report and the chancellor erred in overruling the same. For this reason the decree must be reversed and the cause remanded. We will not, therefore, consider or discuss the other errors assigned, further than to say that even were the note, assignment of stock and mortgage properly in evidence, the absence from the record of both the charter and by-laws of appellee would render it impossible to determine the questions raised as to whether the premium attempted to be enforced was authorized thereby, or whether a right of forfeiture and foreclosure had accrued under the provisions of the by-laws.

Reversed and remanded.

Chicago & Alton Railway Company v. William Wright.

1. **FLAGMAN**—*right to assume presence of, etc.* A person knowing that a flagman is usually stationed at a railroad crossing has a right to rely upon his presence there and the performance by him of his duty.

2. **FLAGMAN**—*duty of.* It is the duty of a crossing flagman to know of the approach of trains and to give timely warning thereof to all persons who attempt to cross the tracks and persons who have occasion to cross such tracks can rely that such warning will be given in case of danger.

3. **FLAGMAN**—*what does not affect liability of railroad company for failure of, to perform duty.* It is immaterial whether or not the duty to maintain a flagman has been imposed by law upon a railroad; if it assumes that duty, it is bound to perform it with due care.

4. **INSTRUCTION**—*when, containing abstract proposition of law, will not reverse.* The fact that an instruction might have been misleading in that it merely contained an abstract proposition of law, will not reverse where the Appellate Court is satisfied that the appellant was not prejudiced.

Action on the case for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

KERRICK & BRACKEN, for appellant; F. S. WINSTON, of counsel.

D. D. DONOHUE and LOUIS FITZ HENRY, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action on the case to recover damages for injuries alleged to have been received by plaintiff at the Washington street crossing of defendant's railroad in the city of Bloomington. Upon a trial by jury in the Circuit Court the plaintiff recovered judgment for \$400, to reverse which the defendant appeals.

The additional count to the declaration upon which the plaintiff relied, charged that the crossing where appellee was injured was a dangerous crossing; that it was the duty of defendant to exercise such a reasonable degree of care

and caution at the said intersection as would furnish reasonable protection for safety to persons and their property in crossing said tracks at such intersection, so that such persons might not unnecessarily be exposed to danger of injury; that for, to-wit, ten years, the defendant had maintained a flagman at this point; that upon the day and date of the injury the defendant negligently failed to have its flagman at said point to warn plaintiff of danger; that not being so warned plaintiff presumed that the crossing was open for public travel and proceeded to cross the tracks; that while so doing and in the exercise of due care for his own safety, as his horse got upon one of defendant's tracks, one of defendant's locomotive engines ran out from behind a string of box cars, then and there standing upon an adjacent track and obstructing plaintiff's view, and struck plaintiff; that he was then and there thrown to the ground and injured, etc.

At the close of the plaintiff's evidence and again at the close of all the evidence, the defendant moved the court to direct a verdict in its favor, which motions were overruled.

Appellant contends that the original motion should have been granted, for the reason that the evidence shows that appellee was not in the exercise of ordinary care at the time he received the injuries for which he seeks to recover.

The material facts as set out in appellant's brief are substantially as follows: At the place of the accident appellant has two main tracks, running north and south. About fifty feet west of these tracks are other of appellant's tracks which cross Washington street. South of Washington street and running east and west are the Big Four and Lake Erie and Western tracks, which cross appellant's tracks, and south of the aforesaid tracks the passenger depot is located. Appellant had for a number of years maintained a flagman at the Washington street crossing of all its tracks. The duties of this flagman required him to watch not only the crossing at the main tracks, but at said other tracks, including that known as the Jacksonville Branch. At the time in question, the flagman's duties had called him to the

Jacksonville Branch, where a switch engine was working at the street crossing; this placed the flagman about "half a block" from where the accident occurred. As appellee approached the crossing, from the east, it was blocked by a freight train standing on the east main track. At the moment he reached the crossing, or immediately thereafter, an opening was made in the freight train for the entire width of the street.

Appellee drove his horse across the east track in a south-westerly direction. Before he started across the track, the front end of a switch engine which was coming from the north on the west track, at a rate of from two to four miles an hour, had reached the south end of the coal cars standing on the east track, at the north side of the street. Three switchmen, Grenner, McCoy and Jones, were riding on the foot-board at the front of the engine. McCoy was on the east end of the board and he first saw appellee at the moment the engine passed the south end of the aforesaid coal cars. Appellee was then just starting to cross the east track and McCoy called to him and threw up his hand. Appellee paid no attention to this warning, but drove right along in the same direction and until he had reached a point south of the south line of the street. At this point the horse's head was in line with the east side of the engine. McCoy remained on the foot-board, leaned over on the draw-bar and the shoulder of the horse struck him on the back. The horse turned from his course somewhat and started in a southerly direction, and some portion of appellee's wagon was struck a glancing blow by the steam cylinder of the engine, which was located just behind McCoy. No part of the horse or wagon was in front of the engine except the horse's head.

There is evidence tending to show that while the ordinances of the city did not require appellant to maintain a flagman at the crossing in question, it had nevertheless, for several years, done so voluntarily. Appellee, knowing, as his testimony discloses, that such flagman was usually stationed at the crossing, had a right to rely upon the presumption that he was at his post and would do his duty.

It is the duty of a crossing flagman to know of the approach of trains and to give timely warning thereof to all persons who attempt to cross the tracks, and persons who may have occasion to cross such tracks can rely that such warning will be given in case of danger. *C. & A. R. R. Co. v. Blaul*, 175 Ill. 183; *C., St. L. & P. R. R. Co. v. Hutchinson*, 120 Ill. 587.

It is the well-settled rule that when a railroad company assumes the duty to maintain gates or a flagman at a railroad crossing, that when the gates are open, or no signal of danger is given by the flagman, then the traveler can assume that it is safe to cross, and such traveler need only look and listen to be in the exercise of due care and caution for his own personal safety. *B. & O. R. Co. v. Stumpf*, 97 Md. 78 (54 Atl. 978); *Sights v. L. & N. R. Co.* (Ky.), 78 S. W. 172; *Woehrle v. Minnesota Transfer Ry. Co.* (Minn.), 84 N. W. 791 (52 L. R. A. 348); *Berry v. Penn. R. Co.*, 4 Atl. Rep. 303.

It is also the law that where it assumes the duty it is immaterial whether or not the duty to maintain a flagman has been imposed by law upon a railroad. If it assumes that duty, it is bound to perform it with due care. *Wolcott v. N. Y. & L. B. R. Co.* (N. J. L.), 53 Atl. 297.

Appellee testifies that when he got to the crossing he stopped and looked for a flagman and saw none; that he heard no bell. We regard the question as to whether the bell upon the engine was ringing at the time as immaterial. By placing and keeping a flagman at the crossing of its own volition, appellant recognized that the crossing was a dangerous one and that the ordinary precautions required by the statutes were inadequate and insufficient to protect the public.

The evidence shows that Washington street was a much traveled thoroughfare; that the crossing in question was in constant use by omnibuses, carriages, wagons and other vehicles, going to and from the appellant's depot, and a coal mine located in the vicinity of the crossing. It further appears that appellant was at the time using one of its

main tracks for switching purposes and the other for the storage of cars; that the switchman, Jones, who with McCoy was riding on the foot-board at the front of the engine and who was watching for pedestrians and vehicles at the crossing, when the engine came from behind the string of cars, failed to see appellee until the engine was almost upon him; and that McCoy was unable to get out of the way in time to avoid being struck by appellee's horse. In view of the foregoing, and other facts and circumstances appearing in the evidence, the trial court would not have been warranted in holding as a matter of law, that appellee was guilty of contributory negligence. The requests for peremptory instructions were, therefore, properly refused.

It is insisted that the court erred in giving the fourth instruction offered by plaintiff. While the instruction is open to the criticism that it is misleading, being but an abstract proposition of law, and not wholly warranted by the evidence, we are satisfied that appellant was not so prejudiced thereby as to warrant a reversal of the judgment. The point alleged to have been omitted from appellee's third instruction is fully and clearly covered by appellant's fourth and appellee's fifth instruction. It is not urged that the damages awarded are excessive. The verdict was, we think, warranted by the evidence, and there being no prejudicial error in the record, the judgment will be affirmed.

Affirmed.

Asa Thomas v. Charles A. Burks.

1. INSTRUCTION—*when, upon burden of proof, erroneous.* An instruction which relieves the plaintiff of the burden of establishing his case by a preponderance of the evidence, in the first instance, is erroneous.

2. MEASURE OF DAMAGES—*when instruction as to, erroneous.* An instruction which tells the jury that if they find the issues for the plaintiff they should assess the plaintiff's damages at the difference

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between the contract price of the article purchased and the market price thereof on a particular day, is erroneous, where the question as to such date (being the date of delivery) is in dispute.

Action of assumpsit. Appeal from the Circuit Court of Piatt County; the Hon. W. G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

HERRICK & HERRICK, for appellant.

JAMES L. HICKS, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

Appellee brought this suit against appellant to recover damages for an alleged breach of contract for the sale and delivery of 3,500 bushels of oats, by appellant to appellee. A trial resulted in a verdict and judgment for the plaintiff for the sum of \$105, from which the defendant appeals. Appellee is engaged in buying grain at Galesville, Illinois, through his agent, one Hayes, while appellant is a farmer, residing near Galesville. It is conceded by both parties that on May 21, 1903, appellant contracted verbally with Hayes to sell to appellee 3,500 bushels of oats, at thirty cents per bushel.

The main controversy between the parties is as to the terms of the contract relative to the time of delivery, and the evidence upon the question is close and conflicting. They agreed that the delivery was to be made during the month of May. Appellant claims, however, and the evidence introduced by him tends to prove, that it was further agreed that in the event that appellant was not able to deliver, or appellee to receive, the grain, during May, it was to remain the property of appellant.

Appellant further claims, and the evidence on his behalf tends to show, that in view of the shortness of the time remaining in May, and the fact that the roads were liable to be bad, appellant was to have not only the month of May in which to deliver, but as much longer time as the market would justify appellee in paying the contract price.

The evidence introduced by appellant further tends to prove that on May 28th, appellant, by messenger, notified Hayes, appellee's agent, that he would deliver the grain on the 29th and 30th days of May, and that Hayes replied that he would be unable to receive the grain at such times, as he was going to receive other grain on those days. Hayes in his testimony denies that such notice was received or answer returned by him. His version of the conversation is that the messenger told him that appellant wanted to know whether it would be all right to deliver the oats on Monday or Tuesday, the first and second days of June, and that he replied that it would be satisfactory. On June 15th, Hayes demanded the oats of appellant, and upon his refusal to deliver them, appellee brought suit. The evidence shows that the prevailing price of oats on May 30th, was from 31 to 31½ cents, and on the 15th of June 32½ to 33½ cents, per bushel. There was evidence tending to support the contentions of both appellee and appellant, but inasmuch as the judgment must be reversed for errors in the rulings of the trial court, we will not attempt to weigh or discuss the evidence.

The second instruction given in behalf of appellee told the jury that before appellant could absolve himself from liability for his failure to deliver the oats, he must not only show that he was ready and willing to deliver them, but that he must also show that he actually made a tender of delivery of the same, or some part thereof. The giving of this instruction was palpable and prejudicial error. It relieves the appellee of the burden of establishing his case by a preponderance of the evidence in the first instance.

By appellee's sixth instruction the jury were told that if they found the issues for the plaintiff, then the measure of damages was the difference between the contract price of May 21, 1903, and the market price on June 15th. The time for delivery under the contract was a material and vital question in the case. This instruction, in effect, told the jury that such time was not limited to the month of May. If appellant's version was correct he was liable only, if at

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all, for the difference between the price on May 21st and May 30th, while the instruction requires the jury, in the event they find that there was a breach, to assess the damages at the difference between the contract price and the price on June 15th. Even if the contract as to delivery was as claimed by appellee, while appellant was entitled to such longer time after May in which to deliver, as the market would justify appellee in paying the contract price, we can conceive of no contingency liable to arise by which appellee would not have been justified in paying the contract price, except a falling market.

The undisputed evidence shows that the price was higher on the 15th day of June, the day of demand, than that fixed by the contract. Conceding appellee's version of the contract to be correct, we think that appellant was entitled to a reasonable time after demand in which to make the delivery, in which case the measure of damages in case of a breach on the part of appellant, would have been the difference between the contract price and the market price at the expiration of such reasonable time. What would have been such reasonable time was a question for the jury. It was not presented to them by instruction or otherwise, and the record is silent upon the question. The instruction for these reasons was erroneous, and should not have been given.

By appellee's fourth given instruction the jury was told that if they believed appellant sold appellee the oats, and later notified appellee that he would not deliver them, then appellant was liable. It contained no requirement that such belief must be based upon the evidence. Numerous other minor objections are urged both as to the rulings of the court upon other instructions and upon the admissibility of evidence. Such as are well taken will doubtless be corrected upon another trial, and we will not extend this opinion by passing upon them in detail.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

**Reuben Fosdick, Conservator, et al., v. G. A. Forbes,
et al.**

1. **FINDINGS OF MASTER—when not disturbed.** The Appellate Court will not disturb the findings of fact made by the master who has heard the evidence, where such findings are not unwarranted by the evidence and have been approved by the trial judge.

2. **RES JUDICATA—what is, in proceeding in nature of creditor's bill.** The denial of a motion to open up a judgment by confession and for leave to plead to the merits is *res judicata* in a proceeding in aid of execution based upon such judgment, as to the questions of breach of warranty and failure of consideration made the basis of such motion.

Bill in nature of a creditor's bill. Error to the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

JOHN E. POLLOCK and J. M. WEAKLY, for plaintiffs in error.

FRANK B. McKENNAN and F. Y. HAMILTON, for defendants in error.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This writ of error is prosecuted to reverse a decree of the Circuit Court, upon a bill in aid of execution filed by defendant in error Forbes, a judgment creditor of A. Fosdick, by which it was sought to set aside an alleged fraudulent conveyance of certain real estate by said Fosdick to Bethiah Fosdick, his wife. Pending the suit, defendant in error Hamilton, another judgment creditor of Fosdick, intervened by petition in said cause. Afterward plaintiff in error Reuben Fosdick, who had been appointed conservator of A. Fosdick, filed a cross-bill therein, praying that the judgments by confession upon which the original bill and intervening petition were predicated, be set aside and that he be permitted to plead and defend in the suits at law. It avers that the only consideration for the notes upon which said judgment had been

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obtained was a horse sold to A. Fosdick by Forbes and warranted to be sound; that said horse was sick and unsound and absolutely worthless; that a fraud was thereby perpetrated upon Fosdick, who, at the time of such purchase and for a long time prior thereto, was mentally incapable of attending to his ordinary business affairs, which condition was easily discernible to any person doing business with him.

Answers to the original bill, intervening petition and cross-bill were filed by the respective defendants thereto and the cause referred to the master, who found that the conveyance by Fosdick to his wife was without consideration and fraudulent; that at the time he gave the notes in question Fosdick was mentally incapable of transacting business; that the question of the soundness or unsoundness of the horse and of its value was therefore immaterial. He recommended that relief be granted in accordance with the prayer of the original bill and intervening petition and that the cross-bill be dismissed. The court overruled exceptions to the report of the master and entered a decree in conformity therewith.

The judgments in question were predicated upon three judgment notes amounting to \$750, given by A. Fosdick on October 10, 1900, in payment for a stallion sold to him by defendant in error Forbes. Two of the notes were retained by Forbes and the other was assigned to defendant Hamilton. Some three days after the purchase of the horse it was killed in a runaway accident. On October 18, 1900, Forbes executed the deed sought by said original bill to be set aside, by which he conveyed all the property which he then owned to his wife. On October 22, 1900, judgments by confession were taken upon the Forbes notes in the Circuit Court of McLean County. At the September term, 1901, of said court, a motion was made by Fosdick that said judgments be opened up, and for leave to plead to the merits, which motion was upon hearing overruled.

On June 5, 1902, pursuant to a finding based upon the

verdict of a jury finding that A. Fosdick was a distracted person and incapable of managing and caring for his estate, plaintiff in error Reuben Fosdick, was by the County Court duly appointed as his conservator.

The evidence as to the mental capacity of Fosdick at the time he purchased the horse and executed the notes in question is close and conflicting. Some fourteen witnesses, bankers, merchants and lawyers, many of whom had had a long social and business acquaintance with Fosdick and had transacted considerable business with him prior to and about the time of the transaction in question, all testify that in their opinion he was at the time competent to transact ordinary business and that they never noticed anything in his dealings, actions or conduct to indicate otherwise.

On the other hand a large number of witnesses, including the members of his family and family physician, testify that at the time and for a number of years prior thereto, he was mentally incapable. Notwithstanding this fact it appears that no question was raised by his family as to his capacity to transact business until after the death of the horse, the conveyance of all his property to his wife and the unsuccessful attempt to set aside the judgments by confession and to establish the defenses to the notes of breach of warranty and failure of consideration. There is evidence tending to show that since the transaction in question Fosdick has continued to transact business; and that in 1902 he purchased another stallion at public sale.

Upon carefully reading and considering the record we are of opinion that the finding of the master upon the question was not unwarranted by the evidence. While his conclusions upon the facts are of an advisory nature and only *prima facie* correct, in cases where he has seen the witnesses and observed their demeanor while testifying, he has an advantage in judging of their credibility, not enjoyed by either the trial court or a court of review, to which due weight should be given. His findings were approved by the chancellor and we are not disposed to disturb them.

The People v. D., S. & St. L. Ry. Co.

We are further of opinion that the judgment of the Circuit Court denying the motion to open up the judgments by confession and for leave to plead to the merits, at which time no claim was made that Fosdick was not of sound mind, was *res adjudicata* upon the questions of breach of warranty and failure of the consideration.

The evidence fully warranted the finding and decree that the conveyance of the real estate by Fosdick to his wife was voluntary and for the purpose of defeating the collection of the notes upon which the judgments in question were entered; in other words to avoid "paying for a dead horse."

The decree of the Circuit Court is affirmed.

Affirmed.

The People, ex rel. James M. Mahoney, State's Attorney, v. Decatur, Springfield & St. Louis Railway Company, et al.

1. **COLLUSIVE SUIT**—*what does not establish.* The fact that the state's attorney institutes a proceeding for injunction in the name of the people at the instigation of property owners, and accepts from them the aid of special counsel, does not establish that the proceeding is collusive, where it appears that such state's attorney received no compensation or promise of compensation for his services.

2. **FRONTAGE CONSENTS**—*right to withdraw.* Property owners signing frontage consents, authorizing the construction of a railroad in front of and along their property, may withdraw the same at any time before finally acted upon by the mayor.

3. **FRONTAGE CONSENTS**—*effect of absence of, upon ordinance.* Where the obtaining of frontage consents from private property owners is essential to the passage of an ordinance, the absence of such consents will render the ordinance void.

4. **STREETS**—*when state's attorney may maintain injunction proceedings to restrain unlawful use of.* The state's attorney of a county is empowered to institute and maintain proceedings to enjoin the unlawful and unauthorized use of a public street by a traction company.

5. **LACHES**—*when doctrine of, does not apply.* The doctrine of laches has no application to and will not apply against a cause brought in behalf of and in the interests of the people.

Bill in chancery. Appeal from the Circuit Court of Macoupin County; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

JAMES M. MAHONEY, State's Attorney, and BELL & BURTON, for appellant.

W. E. P. ANDERSON and RINAKER & RINAKER, for appellees.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an information or bill in chancery, in the name of the People of the State of Illinois, filed by James M. Mahoney, state's attorney of Macoupin county, praying that appellees may be perpetually enjoined from entering upon any portion of West street in Carlinville, a city incorporated under the general incorporation law of Illinois, for the purpose of constructing a railroad, and from constructing such railroad in or upon said street. Upon a hearing upon the merits, the Circuit Court entered a decree dismissing the bill for want of equity, from which the complainant appeals.

Appellees were engaged in building an electric railroad from the city of Springfield to and through the city of Carlinville, and desired to obtain the right to lay down railroad tracks in and upon West street, in said city of Carlinville.

Pursuant to the statute enumerating the powers of city councils, which provides that a city council shall have no power to grant the use of, or the right to, lay down any railroad tracks, in any street of the city, to any railroad company, except upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes (Rev. Stat. 1903), certain persons professing to own property having a frontage of 8,200.5 feet upon said West street (the total frontage upon said street being 13,364.84 feet) on July 30, 1903, filed with the city

clerk of said city a petition asking the city council to adopt an ordinance granting such right to appellees. On August 17, 1903, a number of those who had signed such original petition, and who represented 1,716 feet of frontage, filed with the city clerk an instrument in writing, which was on the same day presented and read to a meeting of the city council, by which they sought to withdraw their signatures from the original petition, and protesting that by reason of such withdrawal there remained no petition signed by more than one-half of the frontage of said street as required by law and therefore the council had no legal power to pass an ordinance granting such privilege. On August 21, 1903, an ordinance was duly passed by the city council authorizing appellees to construct, maintain and operate an electric railway on said West street.

It is first contended by appellees that the bill was properly dismissed for the reason that it appears that the proceeding is not *bona fide* for the purpose of protecting a public right shown to be threatened, but was in fact instituted to protect private owners of abutting property from a threatened injury to their property for which there is a complete remedy at law.

In support of such contention affidavits were presented and filed upon the hearing, to the effect that the bill of information is contained in a wrapper indorsed with the names of the attorneys who are assisting the state's attorney in the case; that the interlineations therein and indorsements thereon are in the handwriting of one of such attorneys, and further that the state's attorney had theretofore stated that the bill was filed in his name because the property owners had been advised by their attorneys that they could not obtain an injunction in any way and that they had for that reason gotten him to file the bill in his own name.

Affidavits filed by appellant show that the information was prepared and filed conjointly by the state's attorney and counsel for certain property owners who were, at the request of the state's attorney, assisting him in the suit,

and that the state's attorney was impelled to act in the matter through the solicitation and importunity of different property holders upon West street and elsewhere in the city. We are unable to perceive how the actions of the state's attorney can be impugned because he was thus moved to act, or that there was any impropriety in his accepting the assistance of private counsel, who were acting also for certain property owners. Any citizen has a right to call upon the state's attorney to redress a public wrong. The fact that private rights may also be involved and that through the acts of the state's attorney in the interests of the public, private wrongs, as well, may directly or indirectly be redressed, is immaterial. There was no impropriety in the action of the state's attorney in requesting and accepting the assistance of such other counsel. Moreover it appears from the affidavit of the assistant state's attorney, made in the absence of his chief from the State, that the information was filed by the state's attorney of his own motion as the representative of the public; that he has not received and does not expect to receive any compensation whatever for his acts or services in the matter. In the case of *People v. G. E. Ry. Co.*, 172 Ill. 129, cited by counsel for appellees, the court dismissed a similar proceeding to this for the reason that it clearly appeared from the evidence that the people were not in fact parties, that, on the contrary, the suit was instituted and prosecuted by the attorney-general at the sole instigation of a rival corporation by which he was employed and paid for his services. Nothing of the kind appears in the case at bar, and we, therefore, hold the contention in question to be unfounded and without merit.

It is further contended by appellees in support of the decree that the parties who signed the original petition asking the city council to grant the privileges sought by appellees could not afterward, and before the adoption of an ordinance, withdraw their signatures from such petition, and revoke such authority as said signatures thereto had given the council.

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In the case of *Theurer v. The People*, 211 Ill. 296, the sufficiency of an application for a license to keep a dram-shop was involved. By an ordinance of the village of Hyde Park, it was necessary that a majority of the property owners within a certain prescribed territory should sign the application for such a license before the same could be granted by the mayor of the city of Chicago, to which the village had been annexed. The application there under consideration was, among others, signed by one Alister, who represented a certain number of feet frontage. It was presented to the mayor on May 29th. On June 22nd, and while the matter was under consideration and the signatures to the application were being verified, the mayor consented that the dram-shop might be opened, subject however, to the revocation of such provisional consent, if evidence should meanwhile be produced, sufficient under the law, in the judgment of the mayor, to invalidate the application. On July 22nd, following, Alister withdrew his name from the application, the effect of which was to leave the application unsupported by the requisite amount of frontage. Whereupon the mayor refused to grant the license. It was insisted by counsel for the applicant seeking the license, that the act of signing the application was an irrevocable act. The court held that Alister had a right to withdraw his consent at any time before the mayor had finally acted. See also, *Kinsloe v. Pogue*, 213 Ill. 302.

We are of opinion that the reasoning adopted and the conclusions reached by the court in the *Theurer* case and the cases there cited, and the rule thereby established, are applicable to the case at bar and are decisive of the question under consideration. That upon the withdrawal by property owners representing 1,716 feet of frontage, of their signatures to the application, there remained no such petition as is required by statute. Consequently the city council were without legal power or authority thereafter to adopt the ordinance in question and such ordinance was void and without legal force or effect.

Appellees further contend that inasmuch as the legisla-

ture has committed to the city of Carlinville, and other like municipalities, its sovereignty in respect to streets, highways and public grounds within its limits, the city of Carlinville is invested with the authority of the State in this respect and is the proper, if not the only party to maintain a bill in equity to restrain obstructions of streets within its limits; that it may, or may not, in its discretion, question appellees' right of occupancy of West street; and further that the city having decided not to act, abutting owners can recover at law and have no other remedy.

In answer to this contention it is sufficient to reiterate that this proceeding is not by abutting property owners, but is, brought by the representative of the public, in their interest and behalf. In *Doane v. Lake St. El. R. Co.*, 165 Ill. 510, it is said where the use of a street has not been legally authorized, an information in chancery by the attorney-general or state's attorney on behalf of the People or a bill for injunction by the city, affords a proper and complete remedy. There is nothing in the authorities cited by counsel inconsistent with the view that a bill may be filed by either the city, the attorney-general or the state's attorney, or that the state's attorney may act regardless of whether the city may or may not think proper to do so. In the case under consideration, the city council has acted without legal authority or power. The theory that unless such city council chooses to stultify itself by authorizing proceedings to attach and defeat the result of such illegal action on its part the public is without remedy in the premises, is without support of reason or authority and clearly untenable.

It is finally insisted that the abutting and other property owners upon whose motion the state's attorney acted, have been guilty of such laches in denying the filing of the bill for five months, while the railroad company was acquiring and grading its right of way, and in failing to urge the application for an injunction for six months further while the company was completing its tracks up West street; that no such drastic relief as asked should be now allowed, but that

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they should be remitted to their action at law. The proceeding being in behalf of, and in the interests of the People, the doctrine of laches is not applicable.

"The attorney-general and the state's attorney may file an information on behalf of the People where the interests of the public are involved and lapse of time constitutes no bar to such proceeding. The doctrine of estoppel does not apply to a matter in the nature of a public right, and the State is not embraced within the Statute of Limitations unless specially named, and, by analogy, does not fall within the doctrine of estoppel." *The People v. Burns*, 212 Ill. 227.

The decree of the Circuit Court will be reversed and the cause remanded with directions to proceed in conformity with the views herein expressed.

Reversed and remanded.

James B. Swing, Trustee, v. Reuben Thomas, et al.

1. **INSURANCE POLICY—when void.** A fire insurance policy issued by a company prior to its being authorized to do business in this State, is void *ab initio*, at least to the extent of enforcement by itself or its successors, and the subsequent compliance by such company with the statutes of this State does not operate to render such policy valid and enforceable; and this principle applies even though such policy was not made in this State, if it was made upon property situated therein and with a citizen thereof.

2. **COMITY—when doctrine of, does not apply.** Comity between States does not extend to the enforcement of an obligation which, though valid in the State where it was executed, is contrary to the public policy of the State where it is sought to be enforced, or is there forbidden by law.

Action in assumpsit. Appeal from the Circuit Court of Douglas County; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

F. T. ROLOSON and PATTERSON A. REECE, for appellant.

JOHN H. CHADWICK and ECKHART & Moore, for appellees.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

The declaration in this case alleges that the Supreme Court of Ohio, in case No. 2,541 thereof, in which case the State of Ohio was plaintiff and said The Union Mutual Fire Insurance Company of Cincinnati, was defendant, disincorporated said insurance company and appointed the appellant the trustee for the creditors of said insurance company, and appellant brought this action by order of said court; that said insurance company was a mutual one, incorporated under the laws of Ohio, and was licensed in April, 1890, to do business in the State of Illinois; that under the laws of Ohio relating to the liability of policy holders in such mutual insurance companies (which are set out verbatim), each policy holder who was insured was bound to pay for such losses and necessary expenses as accrued in and to the company in proportion to the amount of the policy holder's deposit note or contingent liability, and that the contingent liability of policy holders was five times the amount of their respective annual premiums; that the defendants were partners, and, as such, were insured in said insurance company from March 1, 1889, to December 19, 1890, and that their annual premium was \$45; that the Supreme Court of Ohio, in said case No. 2,541, on June 11, 1901, made a decree of assessment, in which the time is divided into seven periods of approximately three months each, and the amount of the unpaid debts and the amount of the contingent liability and the percentage to be assessed is specifically set out in each quarter respectively, and that the defendants were duly notified on January 28, 1903, to pay their said assessment under said decree, and that they refused to pay, etc.

Appellees interposed a general demurrer to the declaration, which was sustained by the court and judgment entered against appellant in bar of action, and for costs.

The errors assigned for reversal are that the court erred in sustaining said demurrer and in rendering judgment against appellant.

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It is first contended by appellant that the fact that the policy upon which the action at bar is predicated, was issued by a foreign insurance company before such company had complied with the statutes of the State of Illinois requiring it to obtain a license to transact business therein, did not have the effect to render such policy void, but voidable merely.

Section 1 of chapter 73 of the Statutes of Illinois (Rev. St. 1903, page 1058), provides, that "It shall not be lawful for any insurance company * * * incorporated by, or organized under the laws of any other State * * * for the purpose of insuring against loss or damage by fire * * * to take risks or to transact any business whatever * * * until it shall have complied with the following requirements in addition to those already imposed by existing laws. * * * It shall first file with the auditor of public accounts, a written application for a license to do business in this State."

Section 2. " * * * and no such incorporated company * * * shall carry on the business for which it may have been incorporated within this State until it shall have obtained such license. Nor shall it be lawful for any agent or agents for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire or inland navigation insurance in this State, without procuring from the auditor of public accounts a certificate of authority, stating that such company has complied with all the requisites of this act which apply to such company, and the name of the attorney appointed to act for the company."

The purpose of the foregoing statute is to protect the public against irresponsible foreign insurance companies. That the issuing of a policy by an insurance company constitutes the transaction of business, within the meaning of such statute, is not controverted.

In the case of Cincinnati, etc., Co. v. Rosenthal, 55 Ill. 91, the court says: "When the legislature prohibits an act, or declares that it shall be unlawful to perform it,

every rule of interpretation must say that the legislature intended to impose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void."

It appears upon the face of the declaration under consideration, that the policies upon which appellant's right of action is predicated, were issued before appellant was licensed to do business in this State. The act of issuing the same being expressly prohibited by the statute, they were void *ab initio* and not merely voidable.

The cases cited by counsel for appellant do not support their contention to the contrary.

Watertown Fire Ins. Co. v. Rust, 40 Ill. App. 119, was an action upon an insurance policy to recover for a loss by fire, and where, as here, the company issuing the policy had not complied with the conditions prescribed by the statute in question. We there held that where an agreement is not unlawful in itself but is forbidden by statute, except upon certain conditions, and both the parties know, or are rightfully presumed to know, the extraneous facts which bring it within the prohibition, they are *in pari delicto*, and relief will be refused to either; but that in cases of agreements made in violation of prohibitory statutes, intended only to restrain one class for the protection of another, though both parties may be *in delicto*, yet they may not be *in pari delicto*, for the reason that while in such case both parties must be presumed to know the law, one of them may not know, nor be rightfully presumed to know, the facts that make it applicable in the particular case and therefore be entitled to relief, although the courts would not aid the other party. It was further held that, in the case then under consideration, the insurance company was bound to know such facts because its right to issue the policy was in the nature of a license upon condition expressed, and that when it undertook to exercise such license, it was bound to know, at its peril, that the conditions were complied with, and that if they were not,

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the agreement on its part was in violation of law and that it thereby acquired no right thereunder which a court of law would enforce. It was also held that the party thereby insured was not *in pari delicto* for the reason that she had violated no provision of the statute; nor was she a party consenting to its violation by the insurance company; nor had she any knowledge of the facts which imposed upon the company a prohibition against the act, nor was she bound to inquire about them; that when the agent of the company proposed to insure her property she was not bound to call for his certificate of authority, but might assume that he had the same, and that as against her claim, the fact that he had none, was no defense. The judgment of the Appellate Court was affirmed, upon appeal, by the Supreme Court. 141 Ill. 85.

Tested by the foregoing views to which we still adhere, the policies in suit conferred no rights upon appellant which he can legally enforce, and to that extent they are absolutely void.

The case of Thompson v. Ins. Co., 66 App. 254 is not in point as the question here under consideration, was not there involved.

It is further insisted by counsel that inasmuch as appellant had complied with the statute in question, before bringing the suit at bar, the contract is rendered enforceable; that the object and purpose of the statute is but to require a foreign company to establish its responsibility, and by the appointment of an agent upon whom process may be served, to place itself in such position that actions may be readily brought against it. In answer to this contention it will suffice to say that if the policies were, as we have already held, void *ab initio* as to any rights conferred thereunder upon appellant, no subsequent act on its part could render it valid. In the cases of Thompson v. Whitehed, 185 Ill. 454, and Buell v. Breese, 65 App. 274, cited by appellant's counsel, the question now under consideration was neither involved nor considered by the court.

It is finally insisted by appellant that inasmuch as the declaration fails to disclose where the policies were "taken out," the foregoing rules of law are not applicable upon demurrer. That, for aught that appears from the record, the contract of insurance may have been entered into and the policies delivered outside of the State of Illinois; that the statute does not assume to prohibit a citizen of the State from entering into contracts of insurance without the State, and that if such a contract be there made, although entered into with a citizen of Illinois, and upon property therein situated, they are not in violation of the statute, notwithstanding the insurance company has not complied therewith.

We do not regard the question of *locus contractus* as at all material to the right of appellant to recover. In *Buell v. Breese*, 65 App. 271, the insurance company of which the plaintiff was receiver was incorporated under the laws of Wisconsin; both the policy sued on and the application therefor were executed in Wisconsin; the receiver appointed by a Wisconsin court sued to recover assessments under the policy. It was contended by the receiver that the contract should be enforced according to the laws of Wisconsin and that he had the right to maintain the action in Illinois, notwithstanding the company had not been licensed to do business there. In its opinion the court says: "True it is that the contract was made in Wisconsin, but true it is also, that the property insured was in Illinois. If this contract can be enforced, successful methods of carrying on business in other States without the intervention of resident agents, will be devised, and the statutory law will become a dead letter, and our citizens will become the prey of irresponsible insurance companies."

In *Rose v. Kimberly*, 89 Wis. 545, it was held that the execution of an insurance policy in a foreign State by a foreign insurance company upon property within Wisconsin, is the transaction of business in the latter State within the meaning of a statute thereof, which provides that, except

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upon certain conditions, no foreign fire insurance company shall "directly or indirectly take risks or transact any business of insurance" within that State. The court in holding that assessments against the policy-holder could not be recovered because the statute had not been complied with, says: "The object of this statute is so plain that it cannot be mistaken. It is to protect our citizens against irresponsible and worthless foreign companies of the very kind which we have now before us. The evil to be corrected is not the writing of the policy by an unlicensed company within this State alone, but the writing of such a policy at all. Bearing in mind the object of the statute and the evil to be corrected, it is very plain that the object will be largely defeated, and the evil will flourish as before, if it be held that companies without license can establish their agencies just outside of the State line and conduct their business by mail."

In *Seamans v. Temple*, 63 N. W. Rep. 408 (Mich.) (28 L. R. A. 430), the court says: "If it be conceded that the contract was made in Wisconsin and that the premiums and loss, if any, are payable there, it is as much in contravention of the policy of this State as though it had been made and was to be performed there. It cannot be supposed that the statutes cited were intended merely to prevent the act of making the contract in this State. The object is to protect the citizens of this State against irresponsible companies, and to prevent insurance by unauthorized companies upon property in this State."

We fully concur in the reasoning adopted in the foregoing cases and are of opinion that even if the policies in suit were not made within this State, having been made upon property situated therein and with citizens thereof, and by a company not licensed to transact business in the State, they were issued in violation of the laws of Illinois, and were injurious to the welfare of its citizens, and cannot therefore be enforced in its courts.

Comity between States does not extend to the enforcement of an obligation which, though valid in the State

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where it was executed, is contrary to the public policy of the State where it is sought to be enforced, or is there forbidden by law. *Pope v. Hanke*, 155 Ill., 617.

The trial court properly held that the declaration was insufficient in law, and the judgment will accordingly be affirmed.

Affirmed.

Mutual Reserve Fund Life Association v. Chester H. Bolles, et al.

1. *LIS PENDENS—when doctrine of, applies.* The doctrine of *lis pendens* applies, and an insurance assessment company entering into a contract of reinsurance is charged with notice of the rights of a member of the company whose contracts are being assumed, where at the time such member is proceeding in chancery for a decree of reinstatement to good standing, and in the event of a successful termination of such proceeding, the reinsuring company is estopped to deny that at the time of entering into said contract, such member was not in good standing.

2. *REINSURANCE—when contract of, authorized.* An insurance company doing business in this State has the right to reinsure a part of its business and of transferring a portion of its membership to another company.

Action of *assumpsit*. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1903. Reversed. Opinion filed April 20, 1905.

KERRICK & BRACKEN, for appellant; GEORGE BURNHAM, Jr., of counsel.

A. G. MURRAY, for appellees.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Hiram O. Bolles died August 8, 1901, and this suit in *assumpsit* was instituted by appellees against appellant, to recover the amount of a benefit certificate for a sum not exceeding \$5,000, upon the life of said Bolles, issued by the Covenant Mutual Benefit Association, payable to appellees

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as beneficiaries. A jury being waived, the cause was tried by the court, resulting in a finding and judgment against appellant for \$2,216.25.

The stipulation in the case, together with oral and documentary evidence introduced and considered upon the hearing, disclose the following state of facts: On February 5, 1884, the Covenant Mutual Benefit Association issued to Hiram O. Bolles, a certificate of membership for an amount not exceeding \$5,000, payable at his death to the beneficiaries therein named. The insured paid all assessments levied against him under the terms of said certificate up to March 1, 1898, when a certain assessment known as No. 149, greatly in excess of the amount authorized, was levied, payable March 31, 1898. This assessment the insured, Bolles, refused to pay, whereupon the said Association dropped him from its roll of membership and thereafter treated said certificate as lapsed and forfeited. Thereafter, on November 4, 1898, Wilson M. Duggans, with Hiram O. Bolles and others similarly situated, filed their bill in equity for relief, resulting in the entry of a decree April 9, 1900, declaring the said assessment No. 149 null and void and restoring complainants to all their rights of membership in the Association upon the payment by them respectively on or before May 1, 1900, of the amounts found to be due.

December 29, 1899, the Covenant Mutual Benefit Association—whose corporate name had been changed to Covenant Mutual Life Association—entered into a transfer or reinsurance contract with the Northwestern Life Assurance Company, a corporation organized under the laws of Illinois, whereby the Covenant Mutual Life Association tendered to the Northwestern Life Assurance Company as members of said Company, each and all of its living members in good standing, except such as should file a written notice of his or her preference to be transferred to some other corporation, in accordance with the provisions of section 16 of an act to incorporate companies to do the business of life or accident insurance upon the assessment plan, etc., approved June 22, 1893, in force July 1, 1893,

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and the Northwestern Life Assurance Company accepted the members so tendered upon condition that said members accede to and be bound by the provisions of the certificates of membership and the by-laws of said contracting corporations then in force or thereafter to be enacted.

On April 26, 1900, one Steward Goodrell, named as trustee for certain purposes in said contract, sent to Bolles, a notice to pay to him (Goodrell) as such trustee the sum of \$205.40, being the amount found by the decree of April 9, 1900, to be due from Bolles to the Covenant Mutual Life Association for assessments in arrears; and further notifying Bolles, that upon payment of said amount he (Bolles) would be restored to membership in said Association and that all assessments subsequently levied against Bolles, would be levied by and payable to the Northwestern Life Assurance Company. In pursuance to such notice and the terms of the decree therein referred to, Bolles, on April 30, 1900, remitted to Goodrell, trustee, the sum of \$205.40.

On August 21, 1900, the Northwestern Life Assurance Company entered into a transfer or reinsurance contract with appellant, a corporation of the State of New York, conducting a life insurance business upon the assessment plan and authorized to do business in the State of Illinois, whereby the Northwestern Life Assurance Company tendered to appellant, each and all of its living members, who, by its books and records, were in good standing, except such as should file written notice of a preference to be transferred to some other corporation, in accordance with the provisions of section 16 of an act to incorporate companies to do the business of insurance upon the assessment plan, etc., approved June 22, 1893, in force July 1, 1893, and appellant accepted the members so tendered, and expressly disclaimed the assumption of any policy or certificate, or any liability on account of any, which did not appear to be in good standing by the books and records of said Northwestern Life Assurance Company. By the terms of the contract, all the members thereby transferred became bound by the provisions of the certificates or policies of

appellant corporation, and by its by-laws then in force or thereafter to be adopted.

On September 1, 1900, at a meeting held for that purpose, this contract of transfer was duly ratified by the members of the Northwestern Life Assurance Company, pursuant to, and in the manner provided by said section 16 of the act before mentioned, but Bolles was neither given nor received any notice of such meeting.

Bolles was not in good standing upon the books and records of the Northwestern Life Assurance Company, neither his name, nor his certificate of membership appearing thereon. No call for the payment of any premium or assessment was ever made by appellant upon Bolles, or on account of the certificates held by him, and said Bolles never paid or tendered to appellant any dues, premiums or assessments upon the certificate of membership sued upon in this case.

The judgment of the trial court was predicated, as appears from the propositions of law held upon the hearing, upon findings, as follows: That the payment by Bolles to Steward Goodrell, trustee of the Covenant Mutual Life Association, of the amount found to be due from him by the decree of April 9, 1900, on account of accrued and unpaid assessments, reinstated him to membership in that Association; that the contract of transfer between the Covenant Mutual Life Association and the Northwestern Life Assurance Company, having been negotiated and executed during the pendency of the suit by Bolles to establish his right to membership in the Covenant Mutual Life Association, he must be held to have become a member in good standing in the Northwestern Life Assurance Company by virtue of such contract of transfer, under the doctrine of *lis pendens*; that appellant as the transferee corporation in the contract of transfer with the Northwestern Life Assurance Company, consummated September 1, 1900, was at that time bound to take notice of the record of the decree of April 9, 1900, and was in law presumed to have knowledge of its contents, as well as of the bill in chancery, in pursuance to

the hearing upon which said decree was entered; that the contract of transfer of September 1, 1900, was effected and consummated under the provisions of section 16 of the act before mentioned, approved June 22, 1893, in force July 1, 1893 (Hurd's Stat. 1903, par. 245, p. 1109), and that the intent and meaning of said section is, that such transfer shall include each and all of the members, certificate or policy-holders of the transferring corporation, who are in good standing in such corporation, or who held valid certificates or policies therein at the time of the transfer, except such as shall within 10 days file written notice of their preference to be transferred to some other corporation; that upon the approval of such contract of transfer by a two-thirds vote of a meeting of the insured, called to consider the same, each and all the members, certificates or policy-holders then in good standing in the transferring corporation, or who then hold valid certificates or policies in such corporation, without further act, become members, certificate or policy-holders, as the case may be, of and in the transferee corporation, and entitled to all the rights and benefits provided in such transfer contract, unless they have at their own request been transferred to some other corporation, as provided in said statute; that the provision of the contract of transfer between the Northwestern Life Assurance Company and appellant, whereby it is attempted to exclude said Bolles from the rights and benefits of said contract of transfer because his name did not appear as a member in good standing upon the books and records of said company, was void as to said Bolles and the beneficiaries named in his certificate; that upon the consummation of the transfer contract of September 1, 1900, the provisions of the certificates and by-laws of appellant corporation, became and were binding upon all the members and certificate holders thereby transferred, and that in pursuance thereto, the certificate sued upon was liable to have set off against it, certain reserve lien charges with interest, together with the annual premium for the current year, with interest, and also certain excess mortality charges, such

items of set-off amounting in the aggregate to \$2,938.39. Cross-errors are assigned by appellees upon the action of the court in allowing the foregoing items of set-off.

Section 16 of the act in question and in pursuance of which the contracts of transfer involved in this case were consummated, is as follows :

“ When and how such corporation may transfer its risks: No such corporation under the laws of this State, shall transfer its risks to, or reinsure them in any other corporation, unless the contract of transfer or reinsurance is first submitted to and approved by a two-thirds vote of a meeting of the insured, called to consider the same, of which meeting a written or printed notice shall be mailed to each member, certificate or policy-holder, at least thirty days before the day fixed for such meeting. If such transfer or reinsurance shall be approved, every member, certificate or policy-holder of the corporation who shall file with the secretary thereof, within ten days after the meeting, a written notice of his preference to be transferred to some other corporation than that named in the contract, shall be accorded all the rights and privileges, if any, in aid of such transfer, as would have been accorded under the terms of such contract, had he been transferred to the corporation named therein.”

“ No such corporation organized under the laws of this State, shall transfer its risks or assets, or any part thereof, to, or reinsure its risks, or any part thereof, in any insurance corporation of any other State or country which is not at the time of such transfer or reinsurance authorized to do business in this State, under the laws thereof.”

While numerous questions are raised by this appeal, both upon the errors assigned by appellant and upon the cross-errors assigned by appellees, we shall here confine our consideration to the determination of such questions only, as appear to us decisive of the case.

In the view we are disposed to take of the case, it may be conceded that the Bolles certificate of membership in the Covenant Mutual Life Association was transferred to the Northwestern Life Assurance Company by the contract of December 29, 1899, and that Bolles thereby became a member of the latter corporation in good standing. The bill in chancery in which Bolles was a party complainant,

praying to be relieved from the payment of assessment No. 149 levied by the Covenant Mutual Life Association, and for reinstatement to membership therein, upon the final hearing of which, a decree granting the relief prayed was subsequently rendered, was then pending. The subject-matter of the transfer contract, viz., the status of Bolles and others similarly situated, as in good standing or otherwise in the Covenant Mutual Life Association, being directly involved in that chancery proceeding, the doctrine of *lis pendens* is clearly applicable, and the Northwestern Life Assurance Company must be held to be estopped from denying that Bolles was a member in good standing of the Covenant Mutual Life Association, and that by virtue of the transfer contract entered into during the pendency of such chancery proceeding, he became a member of the said Northwestern Life Assurance Company. This conclusion is not seriously controverted by appellant. Bolles, being a member in good standing in the Northwestern Life Assurance Company at the time of the execution of the transfer contract between that company and appellant corporation, although he did not appear upon the books and records of said Northwestern Life Assurance Company, as such member in good standing, was he transferred to appellant corporation by the transfer contract entered into in pursuance of the provisions of the section of the statute above quoted?

It is insisted by appellant that the statute empowers the transferring corporation, with the approval of a two-thirds vote at a meeting of its members, to determine the terms of the transfer contract, both as to the members transferred, whether in whole or in part, and also as to the conditions upon which such transfer shall be effected; that no limitation or qualification is to be found in the language of the statute, upon the power to make the contract in question, whereby a part only of the members of the transferring corporation shall be transferred to the transferee corporation; that the statute expressly recognizes the right of the transferring corporation to transfer a part only of its members to the exclusion of another part; that by the terms of

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the contract here involved, Bolles, not being a member in good standing upon the books and records of the transferring corporation, was not transferred to appellant corporation, and that appellees, as the beneficiaries named in his certificate of membership, have no right of action thereon against appellant.

The section of the statute in question was evidently enacted to enable an insurance corporation doing business upon the assessment plan to effect by contract with another corporation, a transfer of its membership to such other corporation, without the necessity of procuring the approval of all the members of the transferring corporation affected thereby to the terms and conditions of such transfer contract. To this end, the section provided that notice of a meeting called to consider the contract of transfer should be mailed to each member, certificate or policy-holder thirty days before the day fixed for such meeting, and that no such contract of transfer should be operative unless submitted to and approved by a two-thirds vote of a meeting of the insured, so-called. We have no doubt but that a contract of transfer so approved, becomes automatically operative to transfer all members within the provisions of such contract, to the transferee corporation, except such as shall express a preference to be transferred to some other corporation; that no affirmative act is necessary to be performed by any member included within the terms of the contract, to effect his transfer.

Aside from designating the method by which a contract of transfer shall be adopted and become operative, the only limitation upon the right to contract, is, that the member shall not be transferred by any such contract to any corporation not authorized to do business in this State, under the laws thereof. It was evidently contemplated by the legislature that a transfer contract approved by a two-thirds vote at a meeting of the members called to consider the same, would be a desirable contract for the members concerned, and there is nothing in the language of the section, which, either by express terms or necessary impli-

cation, restricts the contracting corporations either as to the terms of the contract or the membership to be effected by it. The concluding paragraph of the section, by use of the language, "No such corporation shall transfer its risks or assets, or *any part thereof*, to, or reinsure its risks, or *any part thereof*, in any insurance corporation of any other State or country, which is not at the time of such transfer or reinsurance authorized to do business in this State under the laws thereof," seems expressly to contemplate the making of a contract whereby only a part of the membership or a part of the assets, may be transferred.

Unless the section must be construed to inhibit the contracting corporations from consummating a contract for the transfer of a portion, only, of the members of the transferring corporation, and as requiring the appellant corporation to take all the members in good standing in the transferring corporation or none, appellant corporation cannot be held liable upon the membership certificate or policy of insurance sued on in this case.

That the exclusion of Bolles, by the contract in question, from the benefits of the transfer to appellant corporation, was an act of bad faith upon the part of the Northwestern Life Assurance Company, does not authorize the court to make another and different contract between the parties, than the contract actually made by them, and to hold the appellant corporation liable to pay the amount of the benefit certificate not transferred to it by the terms of the contract.

We hold, therefore, that the transfer contract in question, must in this proceeding be given the force and effect of its express terms and that it did not operate to transfer Bolles to appellant corporation. The views herein expressed are supported by the opinion of the Supreme Court of Iowa, in *Parvin v. Mutual Reserve Life Ins. Co.*, 100 N. W. Rep. 39, construing the same section of the statute with reference to a similar contract of transfer.

The judgment of the Circuit Court is reversed.

Reversed.

Mutual Reserve Fund Life Association v. Philip Mischler, et al.

This case is controlled by the decision in *Mutual Reserve Fund Life Assn. v. Bolles*, *ante*, p. 242.

Action of assumpsit. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1903. Reversed. Opinion filed April 20, 1905.

KERRICK & BRACKEN, for appellant; GEORGE BURNHAM, JR., of counsel.

A. G. MURRAY, for appellees.

PER CURIAM.

In this case judgment was rendered by the court below in favor of appellees and against appellant for \$420.10, being the amount found to be due upon a certificate of insurance issued to Philip Mischler, June 7, 1879, by the Covenant Mutual Benefit Association, for \$2,500. All of the questions involved in this case are considered and determined in the case of *Mutual Reserve Fund Life Association v. Chester H. Bolles et al.*, *ante*, p. 242, and in accordance with the views therein expressed the judgment of the Circuit Court is reversed.

Reversed.

T. C. Veneman v. Leo Buckle.

1. **PARTNERSHIP**—*relief granted upon bill to dissolve.* Upon a bill to dissolve a partnership, the court should not merely divide between the partners the assets of the firm but should settle its affairs, including the payment from its assets of its obligations.

Bill to dissolve partnership. Error to the City Court of Mattoon County; the Hon. LAPSLEY C. HENLY, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

EDWARD C. & JAMES W. CRAIG, JR., for plaintiff in error.

ANDREWS & VAUSE, for defendant in error.

MR. JUSTICE GEST delivered the opinion of the court.

The parties in this suit were engaged in business in partnership. The defendant in error, Leo Ruckle, brought this bill against her partner in business, Veneman, praying for the dissolution of the partnership, the appointment of a receiver, the settlement of the business of the firm, the distribution of its assets and for general relief. The respondent, Veneman, filed his answer to the bill and admitted therein that he was insolvent and consented to the appointment of a receiver. By agreement W. T. Avey was appointed receiver. The case was referred to the master, the master made report, hearing was had upon the pleadings and master's report and final decree entered. No exceptions were taken to the master's report nor does the report appear in this record except as it is referred to in the final decree as the basis of the finding of the court. In that decree the court finds, among other things, that at the time of filing the bill the partnership composed of complainant and defendant was insolvent, was indebted in the sum of \$3,474.87, and that its tangible assets found and reduced to possession by the receiver amounted to \$1,016.98. The court also finds that the defendant Veneman, has in his possession the sum of \$661.11, which is a part of the assets of the firm and should be turned over to the receiver for the benefit, of the firm to be applied on the debts of the firm, and makes the like finding against the complainant, Ruckle, in the sum of \$715.37. The court further finds "that there are no creditors of said firm that are entitled to any preference in the distribution of the funds in the receiver's hands other than those that have already been paid by the order of this court, and that the assets in the hands of the receiver and that may be received by him should be distributed *pro rata* among all the creditors that have proven their claims as appears from the evidence filed in this case and the list of creditors attached thereto," and

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thereupon it is ordered that said Veneman and Ruckle severally turn in to the receiver the said sums above mentioned as in their possession severally and that the receiver pay therefrom the costs and expenses of the proceeding and that "he pay out and distribute the remainder *pro rata* upon the claims filed and proven with him as shown by the evidence, and that he distribute in the same manner any other funds or assets that may come to his hands hereafter, less his reasonable expenses in that behalf to be fixed by the court."

The errors assigned are, first, in ordering Veneman to pay in to the receiver said sum of \$661.11; second, in ordering Ruckle to pay in to the receiver said sum of \$715.37; third, in not ordering Ruckle to pay to Veneman the difference between \$715.37 and \$661.11; fourth, in ordering that the respective parties should pay the sums found due, to the receiver; fifth, in not finding the amount due either from defendant to complainant or complainant to defendant and ordering payment to the one to whom found due; sixth, that the decree is not supported by the allegations of the bill; and seventh, that the decree is not supported by the findings of the court.

The theory of plaintiff in error seems to be that all the court could do under this bill was to find how accounts stood between the two parties and divide the assets between them so that each should receive an equal amount. Plaintiff in error has wholly misapprehended the scope of the bill and the powers of the court thereon. The scope of the bill is to dissolve the partnership and settle up its affairs. A partner has the right in equity to have the firm assets applied to the payment of the firm debts. While the bill does not in so many words pray for such application, the general frame of the bill is to that end and the prayer for general relief is sufficient therefor. The questions raised by the four first assignments are sufficiently answered in Story's Equity Jurisprudence, vol. 1, sec. 672, where the author says: "If it is deemed expedient and proper the court will restrain the partners from collecting the debts or

disposing of the property of the concern and will direct the moneys of the firm received by any of them to be paid into court."

That the decree is not supported by the findings of the court is not tenable, first, because it is so supported, and second, because if it were not, yet the presumption is that it is warranted by the master's report, which plaintiff in error has not seen fit to present in this record.

Perceiving no error in this record the decree will be affirmed.

Affirmed.

Chicago & Alton Railway Company v. Thomas F. Martin.

1. INSTRUCTIONS—*must be predicated upon the evidence.* Instructions must be based upon some evidence in the cause.

Action on the case for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

KERRICK & BRACKEN, for appellant; F. S. WINSTON, of counsel.

HENRY D. SPENCER, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

This is a suit by appellee for personal injuries alleged to have been received by him while he was a passenger on one of the defendant's trains by reason of a collision between the train on which he was riding and another train on the defendant's road. Verdict and judgment were rendered for plaintiff in the sum of \$750.

Appellant claims there is no evidence which warrants a finding for plaintiff. We think there is.

It is also urged that the fourth and fifth instructions given for plaintiff are erroneous. The fourth instruction reads as follows:

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"The court instructs the jury that in estimating the damages which the plaintiff may have sustained by reason of the injury complained of, the jury, if they find for the plaintiff, are not confined to such damages as may have resulted to the plaintiff by loss of time or medical attendance, but may give such additional damage, for the loss of the natural use of plaintiff's arm, if anything, the pain and suffering, mental anguish, which the jury, exercising sound discretion under the evidence, may deem a just compensation for the injuries received."

The instruction assumes that the plaintiff had lost time by reason of the injury received. There is no proof in the record that he lost any time by reason of his injury or by reason of anything. The proof is that he lost no time on any account. The instruction also assumes that the plaintiff had suffered mental anguish occasioned by his injury while the record is barren of proof thereof. It also assumes that the plaintiff had lost, entirely lost, the natural use of his arm. There is proof tending to show that the natural use of his arm had become impaired, and there is evidence tending to prove to the contrary, but there is no proof that there was entire loss of it. These are all questions of fact to be determined by the jury from the evidence and from the evidence alone. They are not matters to be determined or assumed by the court.

The fifth instruction for the plaintiff, which also has reference to the matter of the measure of damages, concludes with the words, "that the jury may take into consideration any damages that they believe from the evidence the plaintiff may sustain or suffer hereafter, growing out of said injuries." This, taken in connection with the assumption by the court in the fourth instruction that the plaintiff had lost the natural use of his arm, would naturally lead the jury to assess damages for future as well as past loss by reason of the assumed condition of his arm. There is no evidence in the record to justify the conclusion that any loss on that account would be suffered in the future. The jury were put on mere speculation as to what damages might by some possibility thereafter ensue. A question

was put, over defendant's objection, to Dr. Kelso, as an expert, which assumed that "the control of all his (plaintiff's) muscles is lessened." There was no evidence to warrant the assumption, and the question was not proper for that reason, but the jury could not have been misled thereby since the proof clearly shows that the muscles of his arm were the only muscles complained of and of which any evidence had been given.

The verdict was for a small sum. If we could say that the evidence clearly justifies the amount awarded, we would be inclined to affirm the judgment notwithstanding the errors committed, but we are not able so to say.

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

George M. Sefton v. A. M. Mitchell and I. B. Mitchell.

1. PLEA—*confession and avoidance, when bad.* A plea of confession and avoidance is bad and is properly overruled on demurrer which neither confesses nor avoids the matter relied upon in the declaration.

Action of assumpsit. Appeal from the Circuit Court of Coles County; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

A. C. ANDERSON, for appellant.

H. A. NEALY, for appellees.

MR. JUSTICE GEST delivered the opinion of the court.

This is a suit by Sefton, plaintiff, against defendants Mitchell, upon a note in which A. M. Mitchell appears to be principal and I. B. Mitchell surety. The defendants pleaded that before the execution of the note sued on one Wing as principal, and said A. M. Mitchell as surety, had made and delivered to Sefton certain described notes bearing various dates for various amounts and payable at vari-

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ous times; that plaintiff knew that A. M. Mitchell was merely surety on said Wing notes; that upon the maturity of each of said Wing notes the plaintiff for a valuable consideration to him paid by said Wing, extended the time of payment of each of them for a period of thirty days without the knowledge or consent of said A. M. Mitchell, the surety thereon; that at the time of the execution of the note sued on the defendants were ignorant of the fact that said extensions had been so made; that plaintiff represented to defendants that A. M. Mitchell was indebted to him on said Wing notes; that the only consideration for the execution of the note sued on was the supposed liability of A. M. Mitchell on the Wing notes; that there was no agreement between said Wing and plaintiff that the notes sued on should be accepted in satisfaction of said Wing notes, and, so they say, said A. M. Mitchell was released from said Wing notes and that there was no consideration for the note sued on. The plea was good and plaintiff recognized its sufficiency and replied. He filed six replications, only two of which, the first and sixth, it is necessary to notice, as the first five are in substance the same.

The first sets up that Wing was principal in the notes above mentioned as the Wing notes "upon which it is alleged time was extended without the knowledge of the surety, A. M. Mitchell," and that Wing, before the execution of the note sued on, executed and delivered to A. M. Mitchell a mortgage upon certain real estate to indemnify him as surety on said notes, and which was of sufficient value to so indemnify.

The sixth replication sets up that each of said Wing notes contained a power of attorney authorizing confession of judgment thereon at any time after the date thereof, and that said powers of attorney were in full force and effect from the dates thereof until the execution of the note sued on. Defendants demurred to each of the replications, the court sustained the demurrer to the sixth replication and overruled the demurrers to the other five. There-

upon the defendants filed rejoinder to each of the five replications held good, which rejoinder was in substance that the time of payment of said Wing notes had been extended, as set up in the plea, before the said mortgage had been taken by A. M. Mitchell, and that he at the time of taking said mortgage had no knowledge that such extension had been made; that the note sued on was executed after the mortgage was taken; that the mortgage was not taken as indemnity against the liability on the note sued on, but as indemnity against the Wing notes and for no other purpose. Plaintiff demurred to the rejoinders, the court overruled his demurrer, plaintiff abided by his demurrer, and the court entered judgment against him for costs.

The sixth replication is manifestly bad; no discussion of that is necessary. The first replication is also bad; the defendants' demurrer thereto should have been sustained. It attempts to confess and avoid the plea of defendants. It neither confesses nor avoids. It does not confess that the extension of time had been given as stated in the plea; neither does it avoid the bar arising from such extension by averring that the defendant A. M. Mitchell knew that such extension had been made when he took the mortgage. Defendants' rejoinder sets up that he had no such knowledge when the mortgage was taken. The defendants' demurrer to the replication having been overruled, they averred in their rejoinder ignorance of the extension at the time when the mortgage was taken. As above stated the replication ought to have averred knowledge by defendants of such extension. The plaintiff's demurrer to the rejoinder should have been carried back to the replication. The same result, however, has been obtained by overruling the plaintiff's demurrer to the rejoinders.

The judgment will be affirmed.

Affirmed.

David Rice v. William B. O'Neal.

1. *INJUNCTION—when agreement properly enforced by.* Where one agrees with another to refrain for a stated period from engaging in a particular business in a certain locality, such agreement may, in the event of violation, be enforced by injunction; and future breaches are presumed to be intended from the fact of previous ones.

2. *AMENDMENTS—when properly allowed.* Amendments upon the hearing of a chancery cause are properly allowed where they do not change the character of the scope of the bill.

Injunction proceeding. Appeal from the Circuit Court of Champaign County; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

CUNNINGHAM & BOGGS, for appellant.

RAY, DOBBINS & RILEY, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

This bill is brought by appellee, O'Neal, to enjoin appellant from carrying on the business of buying and selling lumber and building material in the village of Sadorus in Champaign county. The bill avers that on the first day of February, 1903, O'Neal and Rice were both engaged in the lumber business at Sadorus, and that an agreement was there entered into between them whereby O'Neal bought the stock and trade of Rice and paid him therefor, and Rice in consideration thereof agreed that he would not engage in that business again in that locality in opposition to O'Neal; that Rice since the making of such agreement has violated the same in making sales of lumber to divers parties named in that locality, and is about to make like contracts with other parties, and will continue to carry on such business in that locality in opposition to complainant unless restrained. The cause was referred to the master who made report. Exceptions were taken by both parties to the findings of the master. Upon the hearing the court allowed complainant to amend his bill, sustained complainant's exceptions to the master's report, overruled

those of defendant, and entered decree enjoining defendant, Rice, as prayed in the bill.

Numerous errors have been assigned which in substance may be resolved to a few: first, that the alleged agreement is not proven; second, that no violation of the agreement is proven; third, that there is no proof of defendant's intention to violate the agreement in the future; fourth, that the amended bill materially changes the issues and no opportunity was given to controvert the new issues; and fifth, that the remedy of the complainant is at law and not in equity. We think the evidence satisfactorily establishes the agreement as set out in the bill. The proof as to violation of the agreement is in substance that at different times in the summer following the making of the agreement, several persons residing in the immediate vicinity of Sadorus applied to Rice to get lumber for them from dealers in Chicago; that Rice got the lumber on their orders; that they paid him for the lumber; that the profit to O'Neal on such purchases if they had been made of him would have been about \$150; that the purchases were made through Rice because the lumber could be got cheaper through him than of O'Neal, or any other person; that it was reported about by builders and others that Rice would get lumber for parties who wanted it cheaper than it could be got of other persons. One witness, Goudie, says: "I talked over with Rice about getting the lumber before I got it. He said he could get the lumber or let me have it at just what it cost him; that he would order the lumber for me. He said he was out of the lumber business but that he would order it for me." Rice denies Goudie's statement, denies he had anything to do with some of the transactions, says he made nothing out of any of them, and there is evidence tending to show that his connection with the various purchases was as a matter of accommodation and not of profit. It does not appear that he had any lumber yard, office or place of business as a lumber dealer in Sadorus. Do transactions such as above stated constitute violations of the agreement made between the

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parties? We entertain no doubt that they do. Rice's agreement was not merely that he should not open a lumber yard in Sadorus. The substance of his agreement was that he would not do any business of that kind in Sadorus, either directly or indirectly, for profit or without profit, from good-will to his neighbors or from ill-will to O'Neal, in a lumber yard established by him or at his home, or on the streets or elsewhere within the limits described. The transactions mentioned, if done as claimed without profit, were more injurious to O'Neal than if done with a profit. O'Neal was lawfully seeking by this agreement to increase the profits of his business. The transactions mentioned were calculated to interfere directly with his business and reduce his profits. The evidence shows that the purchasers went to Rice for the very reason that they could buy cheaper of him. If it be allowable to Rice under the contract to sell or assist in selling lumber at Sadorus in the manner designated, to some persons, then he may to any and all. Doubtless his business of selling lumber at cost would increase rapidly and doubtless O'Neal's business of selling lumber at a profit would decrease rapidly.

It is urged that there is no proof that defendant intended to violate the agreement in the future. There was no proof in direct terms that defendant had threatened to continue in the same line of conduct nor was any such proof necessary. It appears by this record that defendant denies that he made the alleged contract, denies that he has done any acts which would constitute a violation thereof. He insists that he has the right to sell lumber when and where and to whom he may please. The proof shows that he has repeatedly violated the agreement, and we conclude that unless in some manner prevented he will continue so to do. Threats expressed in words are not so significant as those expressed in deeds. There was no error in allowing the complainant to amend the bill at the hearing. The amendments merely struck out of the bill unnecessary averments. The character and substance of the bill was in no manner changed. The original bill and the amended bill sought

the same thing, that the defendant be enjoined from violating his agreement, and the premises in each were in substance the same and were sufficient upon which to base the relief asked. No objection was made by defendant to the action of the court in allowing the amendments, nor was it then suggested that new issues were thereby made, and it is plain that no new issue was made.

The only remaining assignment of error which we deem it necessary to notice is, that the remedy of complainant is at law, that equity has no jurisdiction. It is contended that because the proof shows specific transactions, sales of lumber in particular amounts and of particular values, and further shows the profit O'Neal would have made on these sales if they had been made by him, therefore a complete remedy existed at law. The contention is evidently based upon a misapprehension as to the character of proof admissible to show damages in suits at law upon such contracts and also as to the measure of damages therein. In such suits the plaintiff does not seek to recover the profits as profits which the defendant may have received upon certain specific sales by him made. Nor is he limited to proof of such sales nor is he bound to make proof of specific dates, amounts, quantities and values of sales, or profits therein. The plaintiff in such an action sues to recover damages for breach of defendant's agreement to keep out of the business, and any proof is admissible for plaintiff upon the question of damage which reasonably tends to show damage or the amount thereof, and the jury render their verdict for such sum as upon consideration of all the evidence they deem just compensation for the damages sustained. In all such cases the verdict must be necessarily in large measure a mere estimate, sometimes verging upon speculation, always unsatisfactory and questionable in amount on one side or the other; but such is the best that can be done at law. In equity, however, the procedure and end attained are entirely different. Equity does not award damages but stops the source of damage. Equity does not estimate or speculate as to the amount of evil done but prevents the doing it. It

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commands and compels the wrong-doer to cease from the evil where the law simply punishes for the evil done and is powerless to prevent its repetition. The remedy at law is not plain nor adequate nor complete. The remedy furnished by equity does complete justice. Whatever the doctrine may have been in earlier years as to the jurisdiction of courts of equity over contracts of the kind here in question, it has become firmly established, in later years, that equity will take jurisdiction and enforce their specific performance, and this it does because there is no plain, adequate and complete remedy at law. This court said in the case of *Watson v. Ross*, 46 App. 188, a case of just the same character, "It is alleged and proved that he (the defendant) is insolvent, and though it appears that a suit at law was brought and is still pending for damages for the breach of contract, the jurisdiction of a court of equity is clear enough, not on the ground of insolvency merely but upon the general doctrine applicable in such cases."

The decree of the Circuit Court will be affirmed.

Affirmed.

Ferra Williams, et al., v. The Supreme Court of Honor.

1. *JUROR—when overruling challenge to, harmless error.* Where a verdict upon the facts is clearly right, it is harmless error to have improperly overruled a challenge for cause.

2. *SUICIDE—degree of proof required to establish.* In a civil action it is only necessary that the defense of suicide introduced to an action upon an insurance policy be established by a preponderance of the evidence.

Action of assumpsit. Error to the City Court of Mattoon; the Hon. LAFSLEY C. HENLY, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

JOHN McNUTT, JR., for plaintiff in error.

CRAIG & KINZEL, for defendant in error; WILLIAM B. RISSE, of counsel.

MR. JUSTICE GEST delivered the opinion of the court.

On the 25th day of November, 1902, the defendant in this cause, The Supreme Court of Honor, issued its certificate of membership to Clinton Williams. His wife, Lulu Williams, and his children, the other plaintiffs in error, were made the beneficiaries under the certificate. On the 27th of the next month Clinton Williams died and the defendant refusing to pay the amount called for by the certificate, this suit was brought. The certificate provides that defendant shall not be liable if the insured commits suicide "whether sane or insane except it be committed in delirium resulting from illness, or while the member is under treatment for insanity or has been judicially declared to be insane."

The defense made is that the insured committed suicide. Upon a trial by jury the verdict was rendered for the defendant and judgment entered thereon against plaintiffs for costs.

Upon the impanelling of the jury and after both parties had exhausted their peremptory challenges, plaintiffs challenged for cause a juror by name, Fickes. Their challenge was overruled and this action of the court is assigned as error. The alleged ground of challenge is that the juror entertained an opinion upon the merits of the case such as to disqualify him. We are inclined to think that the examination of the juror as given in the record shows that he was not qualified, and we are also inclined to believe that if his examination had been further pursued and the real character of his opinion ascertained it would have been disclosed that his disqualification was only apparent and not real. But assuming that it was error to overrule the challenge, we do not think it was such error as requires this judgment to be reversed, for the reason that under the evidence no reasonable conclusion, other than that the insured committed suicide and that he was not within any of the exceptions mentioned in the certificate, can be reached. At the request of plaintiffs, the court gave the two instructions, following:

First. "The court instructs the jury that so strong is

the instinctive love of life in the human breast and so uniform the efforts of men to preserve their existence that suicide cannot be presumed. The plaintiffs are, therefore, entitled to recover, unless the defendant has by competent evidence overcome this presumption, and satisfies the jury by a preponderance of the evidence that the injuries which caused the death of the said Clinton Williams were intentional on his part. The presumption is that death was not voluntary; and the defendant, in order to sustain the issue of suicide on its part, must overcome this presumption and satisfy the jury that death was voluntary."

Second. "The jury are instructed that the burden of proof is upon the defendant to prove that Clinton Williams did intentionally commit suicide, and if it appears from the evidence that the defendant relies upon circumstantial evidence alone to prove such intentional suicide, then the court further instructs you that such circumstantial evidence to be sufficient to base a finding upon, must be of such a character as to exclude with reasonable certainty any other cause of death."

If the verdict and judgment were against the defendant this court would be compelled to set it aside for error against defendant in giving these instructions. They require the defendant to make proof of its ground of defense with substantially that degree of certainty which is required to be made in prosecutions for criminal offenses. Notwithstanding this undue burden placed upon defendant, the jury found for the defendant, and in our judgment the evidence warranted the verdict, even conceding that these instructions were correct.

It is also claimed by plaintiffs in error that the court erred in giving one of the instructions given for defendant and in admitting certain expert testimony, and that the verdict is against the evidence. The instruction was inartificial but not erroneous or misleading. If the expert evidence had been omitted no different result could have been reached, and we have above said that the verdict is supported not only by the preponderance of the evidence, but by such preponderance as amounts to the exclusion of reasonable doubt.

The judgment will be affirmed.

Affirmed.

Edward J. Flynn v. City of Springfield.

1. **PENAL ACTION**—*when may not be dismissed.* The city council cannot by an order necessarily obtain the dismissal of a penal action brought in its name for the violation of its ordinance.

2. **CITY ATTORNEY**—*duty of.* In suits concerning the city regarded as an individual, the city attorney is required to follow the direction of the city council, but in all matters that merely concern the public, which are for the preservation of morals, the maintenance of good order, the abatement of public nuisances, the destruction of dens of vice and infamy, he is wholly independent of the city council, is a servant of the people, and as to such matters, vested with powers and burdened with duties over which the council have no jurisdiction.

3. **ORDINANCE**—*how question of reasonableness of, determined.* The question as to whether an ordinance is reasonable is one of law for the court.

4. **GAMBLING ORDINANCE**—*when not unreasonable.* Such an ordinance which provides that one "found" in a gambling resort is guilty of a violation thereof, is not unreasonable.

Action of debt for penalty. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

JAMES A. CONNOLLY and DAVIS McKEOWN, for appellant.

ARTHUR M. FITZGERALD, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

The city attorney of the city of Springfield brought this suit in the name of the city against the appellant, Flynn, for the recovery of penalties for the violation of certain ordinances of the city. The declaration is in debt and consists of twenty-six counts. Each of the first thirteen counts sets up the following section of an ordinance:

"652. **INMATES OF GAMING HOUSE.** Whoever shall be an inmate of any gaming house or room, within said city, or shall be in any way connected therewith, or shall frequent or visit the same or be found therein; or whoever shall, within the city, play for any money or other valuable thing at any game with cards, dice, billards, or any other instrument or device whatsoever; or whoever shall

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bet on any such game when played by others, shall, on conviction, be fined not less than ten dollars nor more than one hundred dollars for each offense."

And each of the remaining thirteen counts sets up the following ordinance:

"651. GAMBLING HOUSE OR ROOMS. Whoever shall, within the city of Springfield, set up, keep, maintain or support any gambling house or room, or place used for the practice of gaming or playing for money or property, or shall knowingly permit any building or premises owned or controlled by him to be used for any such purpose, or whoever shall keep or use, or permit to be used, in any building or place occupied, controlled or owned, by such person, any keno or faro table, wheel of fortune, roulette, shuffle board, cards, or other instrument or device, commonly used for the purpose of gaming, shall, upon conviction, be fined not less than twenty-five dollars nor more than two hundred dollars for each offense."

Defendant pleaded the general issue, a trial was had by jury and a verdict rendered finding the issues for the plaintiff upon the first thirteen counts, and fixing the amount of the finding at \$50, on each count, in all the sum of \$650, and the court after overruling a motion for new trial entered judgment for the plaintiff for that sum.

There are but two questions presented to us by the argument of counsel for appellant: first, did the court err in refusing to dismiss the suit, and second, is the verdict justified by the law and the evidence. It appears that Mr. Salzenstein, claiming to be corporation counsel, appeared in the Circuit Court and moved to dismiss the suit and in support of the motion offered the following:

"Ordered by the City Council of the City of Springfield: That the City Attorney is hereby instructed to discontinue action in cases brought in the name of the City in the Circuit Court for violations of ordinances for the following reasons:

First, he was not instructed by this council nor any officer of the city so to do;

Second, for the reason that the grand jury was in session

Edward J. Flynn v. City of Springfield.

1. **PENAL ACTION**—*when may not be dismissed.* The city council cannot by an order necessarily obtain the dismissal of a penal action brought in its name for the violation of its ordinance.

2. **CITY ATTORNEY**—*duty of.* In suits concerning the city regarded as an individual, the city attorney is required to follow the direction of the city council, but in all matters that merely concern the public, which are for the preservation of morals, the maintenance of good order, the abatement of public nuisances, the destruction of dens of vice and infamy, he is wholly independent of the city council, is a servant of the people, and as to such matters, vested with powers and burdened with duties over which the council have no jurisdiction.

3. **ORDINANCE**—*how question of reasonableness of, determined.* The question as to whether an ordinance is reasonable is one of law for the court.

4. **GAMBLING ORDINANCE**—*when not unreasonable.* Such an ordinance which provides that one "found" in a gambling resort is guilty of a violation thereof, is not unreasonable.

Action of debt for penalty. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

JAMES A. CONNOLLY and DAVIS McKEOWN, for appellant.

ARTHUR M. FITZGERALD, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

The city attorney of the city of Springfield brought this suit in the name of the city against the appellant, Flynn, for the recovery of penalties for the violation of certain ordinances of the city. The declaration is in debt and consists of twenty-six counts. Each of the first thirteen counts sets up the following section of an ordinance:

"652. **INMATES OF GAMING HOUSE.** Whoever shall be an inmate of any gaming house or room, within said city, or shall be in any way connected therewith, or shall frequent or visit the same or be found therein; or whoever shall, within the city, play for any money or other valuable thing at any game with cards, dice, billards, or any other instrument or device whatsoever; or whoever shall

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bet on any such game when played by others, shall, on conviction, be fined not less than ten dollars nor more than one hundred dollars for each offense."

And each of the remaining thirteen counts sets up the following ordinance:

"651. GAMBLING HOUSE OR ROOMS. Whoever shall, within the city of Springfield, set up, keep, maintain or support any gambling house or room, or place used for the practice of gaming or playing for money or property, or shall knowingly permit any building or premises owned or controlled by him to be used for any such purpose, or whoever shall keep or use, or permit to be used, in any building or place occupied, controlled or owned, by such person, any keno or faro table, wheel of fortune, roulette, shuffle board, cards, or other instrument or device, commonly used for the purpose of gaming, shall, upon conviction, be fined not less than twenty-five dollars nor more than two hundred dollars for each offense."

Defendant pleaded the general issue, a trial was had by jury and a verdict rendered finding the issues for the plaintiff upon the first thirteen counts, and fixing the amount of the finding at \$50, on each count, in all the sum of \$650, and the court after overruling a motion for new trial entered judgment for the plaintiff for that sum.

There are but two questions presented to us by the argument of counsel for appellant: first, did the court err in refusing to dismiss the suit, and second, is the verdict justified by the law and the evidence. It appears that Mr. Salzenstein, claiming to be corporation counsel, appeared in the Circuit Court and moved to dismiss the suit and in support of the motion offered the following:

"Ordered by the City Council of the City of Springfield: That the City Attorney is hereby instructed to discontinue action in cases brought in the name of the City in the Circuit Court for violations of ordinances for the following reasons:

First, he was not instructed by this council nor any officer of the city so to do;

Second, for the reason that the grand jury was in session

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at the time the præcipe in those cases were filed and true bills were found;

Third, if for any reason he shall refuse, the Mayor is hereby instructed to order the Corporation Counsel to dismiss the said cases for the city.

Passed by the City Council of the City of Springfield, Ill., November 2, 1903.

C. F. MORROW, City Clerk."

And also the following:

"SPRINGFIELD, ILL., NOV. 4, 1903.

ALBERT SALZENSTEIN, Esq., Corporation Counsel of the City of Springfield, Ill.

DEAR SIR: You are hereby notified that I have directed the City Clerk to transmit to you a certified copy of an order passed by the City Council, Monday evening, November 2, directing the City Attorney to dismiss certain suits brought in the name of the City of Springfield, and pending in the Circuit Court of Sangamon County, Illinois, specified in said order, upon my requesting him to do so, and upon his failure or refusal to dismiss said suits, that I request and direct you as Corporation Counsel to dismiss said suits. I further notify you that I have requested Arthur M. Fitzgerald, City Attorney of the City of Springfield, Illinois, to dismiss the suits specified in said order and he has refused so to do. I therefore request and direct you to dismiss said suits.

Yours very truly,

HARRY H. DEVEREAUX, Mayor."

The motion was contested by city attorney Fitzgerald and was overruled by the court. Afterward the defendant entered his motion to dismiss the suit, based upon the same proceedings and action of the city council and the mayor, and his motion was overruled. It is argued by the appellant that this is a mere civil suit for the recovery of a debt, that a plaintiff may dismiss his suit when he please whether his attorney approve it or not, and that the city attorney was bound to follow the direction of the city council "just as any other attorneys are subject to the direction of their

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clients in that respect." The argument is based upon an entire misapprehension of the nature of this proceeding. It is not a mere civil suit. While it is civil in form, it is such only in form. It partakes largely of the criminal nature. The ordinances were not passed with the view of creating the relation of debtor and creditor. Violation of the ordinance established no contractual relation. No such relation was created or could be created thereby. The violator becomes subject to a penalty for the offense he has committed. By long established practice all such penalties are recoverable by action of debt. The plaintiff in an ordinary civil suit is entitled to recover if the evidence merely preponderates in his favor. In suits for the recovery of penalties the plaintiff is not entitled to recover upon a mere preponderance of the evidence; to authorize recovery in such case there must be a clear preponderance in favor of plaintiff. The appellant asked and the court gave in his behalf an instruction stating the law so to be. Such suits more nearly resemble criminal proceedings than civil, in all their essential elements. In an ordinary civil suit by a city, judgment may be rendered for costs against the city just as against plaintiff in any case brought by an individual, but in all suits brought for violation of ordinances such as here in question, no judgment for costs may be rendered against the city when the issue is found against the city. The reason for the difference is manifest. In the one case the city assumes the position of an individual seeking the enforcement of a personal right. In the other, it is simply a public agency for the preservation of good order, for the enforcement of *quasi* criminal provisions of law. The proceeding being of the nature above mentioned, was the city attorney bound to obey the orders of the city council and dismiss the suit? We think not. The relation existing between the city attorney and the city council is not that of client and attorney. The city attorney becomes such in pursuance of law, he is elected by the people, his powers and duties are determined and defined by law; he is the law officer of the city, but he is not the mere servant of the city council. In suits that concern the city regarded as

an individual, the city attorney is required to follow the direction of the city council; but in all matters that merely concern the public, which are for the preservation of morals, and maintenance of good order, the abatement of public nuisances, the destruction of dens of vice and infamy, he is wholly independent of the city council, is a servant of the people, and as to such matters, vested with powers and burdened with duties over which the council have no jurisdiction.

In support of his proposition that the verdict is against the law and the evidence, it is urged by appellant that said section 652 is unreasonable and therefore void. Whether or not it be unreasonable is a question of law for the court, not of fact for the jury. Under section 652 defendant was charged with being an inmate of a gaming house or connected therewith or with being a frequenter or visitor thereof or found therein. Appellant argues: "The ordinance presumes that every one found in a gambling house is guilty of at least encouraging and abetting the game going on there," and that therefore the ordinance is unreasonable. He further says: "If section 652 be limited to those who visit, frequent or are found there for the purpose of gaming or to aid, abet or encourage others to gamble," then the section is not unreasonable. And again it is argued: "There is no evidence that he was in any manner aiding, assisting or abetting either the gaming or the keeping of the gambling house." Gaming and gaming houses are both prohibited by statute. A gaming house is an unlawful place. It is contrary to law that such a place should exist. No citizen has the right to maintain or assist in maintaining such a place. The argument of appellant summarized is simply this: that it is not and cannot be an offense for a citizen to visit, frequent or be found in a gaming house unless he be found there actually gaming or assisting in the gaming or in the keeping of the gaming place. To illustrate the unreasonableness of the ordinance it is argued: "The physician who goes in to visit one suddenly taken ill is guilty; the Salvation Army girl who goes in to solicit charity is guilty; the street preacher who goes

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in to labor for the conversion of the inmates is guilty." The law-abiding physician who might perhaps be called into a gambling place to visit one suddenly taken ill is not "found" there; it is a possible thing that he should be brought there for that purpose but he is neither a frequenter nor visitor nor person "found" there. It may be that the gambling houses of Springfield are so openly conducted that the Salvation Army and the street preachers carry on their work there, but, if so, it is somewhat out of the ordinary. It is not matter of general knowledge that divine services are ever conducted at such places. As we have been led to believe, gambling places are usually at least conducted under lock and key and none but the initiated are admitted. The officers of the law sometimes get in such places but they are not found there. They sometimes find others there. The natural, reasonable and legitimate inference to be drawn from the fact that a person is found in a gambling place is that he is there to gamble and to encourage, aid and assist in the maintenance of the place. We conclude that the ordinance is not obnoxious to the objection that it is unreasonable.

As to the point that the evidence does not sustain the verdict, it clearly and satisfactorily appears from the record that at the several times mentioned in the first thirteen counts "Lane's Place" at No. 415 Washington street, was a gambling house in full operation. The evidence also clearly shows that defendant was a visitor there and found there at those several times, and that he was not there for any legitimate purpose; that he and scores of other persons were by their presence aiding and abetting, assisting and encouraging the maintenance of the place; that he was not there by mistake. One visit by mistake, if such a thing were possible, would have informed him of the character of the place. He continued his visits day after day after he discovered his mistake, if any, he made. The ordinance is not unreasonable, the verdict of the jury is fully sustained by the evidence, there was no error in the trial of the cause, the judgment of the court is right and will be affirmed.

Affirmed.

Chicago & Alton Railway Company v. James Kirkland.

1. EVIDENCE—*when conclusion of witness competent by way of.* Where a question calls for the conclusion of a witness, a responsive answer giving a conclusion, is not improper where the question itself was unobjected to.

2. INSTRUCTION—*as to mode of arriving at verdict, properly refused.* An instruction as follows:

“The court instructs the jury that they have no right to compromise in their verdict between the question of liability and the amount of damages, for if they shall find that according to the law as stated to them in the instructions of the court, under the evidence in the case, the defendant is not liable, then the plaintiff is not entitled to any damages, and it is the duty of the jury to so find by their verdict; and the jury must not arrive at their verdict by lot or chance; and no juror should consent to a verdict which does not meet with the approval of his own judgment and conscience, after due deliberation with his fellow jurors, and fairly considering all of the evidence admitted by the court, and the law as stated in the instructions of the court,—”

is properly refused.

Action on the case for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

PATTON & PATTON, for appellant; F. S. WINSTON, of counsel.

PERRY & MORGAN, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

The declaration is in case, the plea is the general issue, the verdict and judgment are for the plaintiff, Kirkland, for the sum of \$1,250.

The declaration avers that the plaintiff was a brakeman in the service of the defendant company and on March 21, 1904, was engaged in braking on a train of freight cars of defendant, then being run and moved upon its railroad; that defendant negligently permitted one of the grab-irons upon the side of one of the cars in the train to become and remain insecurely fastened to the car; that plaintiff in the discharge of his duty as a brakeman in climbing up the side of a car to release a set brake took hold of the loose

grab-iron, which gave way by reason of its insecure fastening, whereby plaintiff fell to the ground and between the cars, and his left hand was run over and crushed by the wheels and he was otherwise injured and bruised.

At the close of the evidence on the part of the plaintiff and again at the close of all the evidence, the defendant in due form moved the court to instruct the jury to find the defendant not guilty; both motions were overruled and this action of the court is assigned as error. There was no error in the refusal of the court so to instruct. There was evidence tending to prove the essential averments of the declaration. In such case it is the duty of the court to submit the issue to the jury.

It is also contended that the trial court admitted improper evidence on the part of the plaintiff. The plaintiff was a witness in his own behalf and on his direct examination his counsel asked the question: "What is your condition with reference to being able to follow your business?" The plaintiff replied: "Well, I am not able to follow railroad freight work." There was no objection made to the question by the defendant but it objected to the answer. Counsel for the defendant say in their argument that the question was perfectly proper but that the answer was the mere opinion or conclusion of the witness and therefore improper. If it be conceded that the question was proper, it follows necessarily that the answer is proper. The question is precisely as if it read: "State whether or not in your condition you are able to follow your business." The answer was directly responsive to the question. No other alleged error in admission of evidence is complained of.

It is urged that the verdict is against the evidence, that the evidence shows that the plaintiff was not in the line of his duty, and fails to show that the defendant was guilty of negligence. We have above stated that there was evidence tending to prove the material averments of the declaration. The verdict having been rendered for the plaintiff, the trial judge having approved the verdict, and this court not perceiving that the evidence clearly preponder-

ates in favor of the defendant, we are not inclined to reverse upon that ground. The train left Springfield where it was made up at 7:35 A. M., Monday, March 21st. According to appellant's statement it ran to Peabody, five or six miles from Springfield, and from that point to Sherman, two miles further, where the accident happened; that is, it had run seven or eight miles. There is no question that the grab-iron was out of order at the time of the accident; the nut which held one end of it on the bolt and thereby secure to the car, was then gone; the evidence shows by the appearance of the thread on the bolt that the nut had not within a short time left the bolt. The inference from the proof as to the condition of the thread is natural, just and reasonable, that the nut was off for sometime before the train left Springfield, more reasonable than the theory of the appellant that it was jolted off by the movement of the car in going seven or eight miles.

To rebut the proof of plaintiff on this point defendant called its car inspector, Harrington, as a witness, who testified: "About March 19th, 20th and 21st, I was car inspector of defendant at Springfield, and made an inspection of car 7355 (the car in question) about that time. On the 19th of March I inspected the car and there was nothing the matter with it that I noticed." That is the whole of the proof as to inspection. Of what his inspection consisted is left to conjecture. The jury were justified in concluding that the nut was off the bolt at the time the so-called inspection was made, and also justified in concluding that that kind of inspection was equivalent to none, and that the defendant was guilty of negligence as charged. The plaintiff was head brakeman, Datum was rear brakeman and Platt was swingman. The car from which plaintiff fell was the third from the caboose, which was at the rear, and there were nine cars in all in the train. It is urged that plaintiff was outside of his duty in attempting to release the brake on that car, that he should have been at the head end of the train. The conductor of this train testified that it was the duty of plaintiff when the train

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was moving out from a station to get on wherever he wanted to and if he saw a set brake any where on the train, to release it. The plaintiff was not out of the line of duty in attempting to climb that car to release the brake on it which was then set.

The court refused to give the following instruction asked by defendant:

“The court instructs the jury that they have no right to compromise in their verdict between the question of liability and the amount of damages, for if they shall find that according to the law as stated to them in the instructions of the court, under the evidence in the case, the defendant is not liable, then the plaintiff is not entitled to any damages, and it is the duty of the jury to so find by their verdict; and the jury must not arrive at their verdict by lot or by chance; and no juror should consent to a verdict which does not meet with the approval of his own judgment and conscience, after due deliberation with his fellow jurors, and fairly considering all of the evidence admitted by the court, and the law as stated in the instructions of the court.”

There was no error in refusing this instruction. Birmingham Fire Insurance Co. v. Pulver, 126 Ill. 329.

The remaining assignment of error that is presented by counsel is that the damages are excessive. The proof is that the third finger of the plaintiff's left hand was crushed off except a short stump of a half inch, and that the first joint of the little finger of that hand is stiffened. The plaintiff testifies that three pairs of trucks passed over him, the brake beam hit him in the back, his leg was sprained and that he still suffers pain in his back and leg and in the injured hand when it strikes against any object. We are not inclined to think that the damages are so large as to require a reversal of the judgment. Not perceiving any substantial error in the record the judgment will be affirmed.

Affirmed.

**P. H. MaGirl v. E. J. Hastings and Frank Supple,
Partners, etc.**

1. PROPOSITIONS OF LAW—*when improperly refused.* Where propositions of law are pertinent to the evidence, it is error to refuse the same.

2. ESTOPPEL—*when doctrine of, does not apply.* Mere acceptance by a party of work done for him without complaint, does not operate as an estoppel to institute an action for damages for breach of contract.

Action of assumpsit. Appeal from the Circuit Court of McLean County; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

ROWELL & LINDLEY, for appellant.

KERRICK & BRACKEN, for appellees.

MR. JUSTICE GEST delivered the opinion of the court.

This is a suit by Hastings & Co. against MaGirl to recover an alleged balance due them upon a contract entered into between the parties whereby plaintiffs were to provide the materials and perform the work for the building of the foundations and walls of a foundry for defendant, MaGirl. The declaration consisted of simply the common counts. The general issue was pleaded and several special pleas. A jury was waived and by agreement of parties the cause was tried by the court. A finding was made for the plaintiffs in the sum of \$806.43, upon which judgment was entered.

The record shows that prior to rendition of judgment the trial judge by the agreement and at the request of both parties made a personal examination and inspection of the walls and all other work in controversy in this cause; that when the bill of exceptions was presented to the trial judge for his signature and seal the defendants objected to its being shown in the bill that he had by such agreement made such examination and inspection; that the objection was overruled and defendant excepted; that

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thereupon defendant requested the judge to insert in the bill a statement and findings as to what he saw and observed at such examination and inspection, and that the request was denied and the defendant excepted. The defendant pleaded divers items of set-off and damages by reason of bad workmanship and for failure to complete the work in the time provided by the contract. The arguments contain much discussion of the evidence concerning these various matters, but we do not deem it necessary to say further of them than that the evidence in relation thereto is contradictory, and that in view of our conclusion that the judgment must be reversed for error of law, it is not necessary for us to consider the question as to where the preponderance of the evidence lies.

The contract contains the following provision: "All payments shall be made upon the written certificates of the architect to the effect that such payments have become due." The fourth plea sets up that provision and that no such certificate had been given. The replication thereto avers that by mutual agreement said provision was waived, canceled and abrogated, and issue was made upon that agreement. We think the evidence in the record establishes the truth of the replication. Defendant submitted to the court thirteen propositions of law, two of which were by the court held and eleven refused. No propositions were submitted by the plaintiffs nor were any stated by the court on its own motion. The following proposition offered by the defendant was held by the court: "The court holds that by the written and sealed contract in evidence in this case for the construction of the concrete walls in controversy, the plaintiffs were required to so construct said walls as to make the inside and outside faces of said walls smooth and even, and said faces were required to be of cement and sand in the proportion of one part of cement to three parts of sand," and the two following, and others of substantially the same import were refused by the court: "The court holds that a failure by defendant to mention to plaintiffs his claim for damages

for improper construction of the concrete work until after the parties had together measured the dimensions of the foundation in an effort to agree upon said measurements, would not raise any estoppel against defendant to claim such damages by reason of said work not being constructed in accordance with the requirements of the written contract as are shown by the evidence in this case;" and, "The court holds that the law is that the defendant may by showing that said concrete walls are not constructed as required by said written and sealed contract and that the faces thereof are not smooth and even inside and outside, and that in other ways said walls fail to fulfill the requirements of said contract and that damage is caused to defendant and to said building by reason of said failure, set off against the claim of plaintiffs for the price of constructing said concrete work, the amount of said damage as the same appears from a preponderance of the evidence." No proposition covering or relative to the subject of these refused was held by the court. We are at a loss to perceive why these propositions were not held. They are pertinent to the evidence shown by the record. Their refusal was in substance a holding that appellant by his silence or in some other way, was estopped to set up any claim for damages. The record is barren of proof to establish estoppel. No element of estoppel appears to exist. The view taken seems to have been that appellant received the work done without complaint and thereby was precluded from setting up any claim for damages. We do not understand the law so to be. If the contractor fails to perform his contract a right of action accrues to the owner to recover damages for such failure. The acquisition of such right of action does not depend upon his making mention or complaint of such failure or demand for the due fulfillment of the contract. It is the contractor's business to fulfill his contract whether or not complaint or demand be made by the owner. If he fails to fulfill and thereby a right of action for damages accrues to the owner, the latter does not lose such right by his failure to complain when he receives the

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work. A substantial legal right to damages may be released, paid or otherwise satisfied or settled but it is not and cannot be lost or extinguished by mere failure to declare that it exists. Failure to claim it may under certain circumstances be strong evidence that none exists. It is evidence tending to disprove the existence of an alleged fact, to wit, a right of action for damages. If the fact of right of action exists then failure to claim it is of no significance whatever. There is no question of the Statute of Limitations involved, nor has the doctrine of waiver any application.

It is also urged that the plaintiffs cannot recover upon the common counts. Whether or not they may recover under the common counts depends upon their making proof that they did substantially perform the contract, or if they did not that it was by reason of defendant's fault. We do not deem it necessary or proper to discuss the evidence upon that question. The error of the trial court in its holdings upon propositions of law necessitates the reversal of this judgment, and the fact that the trial judge at the request of both parties examined the work, does not relieve us from the necessity, since the error of law may have applied as well to what he learned by his examination as to the other evidence in record.

The judgment is reversed and the cause remanded.

Reversed and remanded.

John T. Dawdy v. Rebecca Wright.

1. *SURREJOINDER—when overruling demurrer to, not reversible error.* The overruling of a demurrer to a surrejoinder is not reversible error where there is one good plea to the declaration.

Action of replevin. Appeal from the County Court of Moultrie County; the Hon. E. D. HUTCHINSON, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

R. M. PEADRO, for appellant.

SPITLER & JENNINGS, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

This suit is in replevin by appellee against appellant. Appellant pleaded, first, property in defendant and not in plaintiff; second, *non detinet*; third, *non cepit*; fourth, the usual plea of justification by an officer under a writ of execution. Issues were made upon the first three pleas. Three replications were filed to the fourth plea. Appellant demurred to the first replication to the fourth plea and his demurrer was sustained. To the second replication to the fourth plea he made rejoinder and to this rejoinder appellee demurred and his demurrer thereto was sustained. Error is not assigned upon the action of the court sustaining this demurrer nor could error be successfully assigned upon it. To the third replication to the fourth plea appellant rejoined and appellee filed her surrejoinder, to which appellant demurred and his demurrer was overruled. Error is assigned by appellant upon the overruling of this demurrer. From the foregoing statement it will be seen that no issue upon the fourth plea was presented to the jury in the trial court and that no question arises upon it in this court. By the record presented in this court appellee's second reply to that plea stands confessed to be good and neither traversed nor avoided. One good reply to a plea is enough. It is consequently of no importance whether appellant's demurrer to appellee's surrejoinder to appellant's rejoinder to appellee's third replication to the fourth plea was sustained or overruled. By the holding of the court and the acquiescence therein of appellant, both in the trial court and this court, the fourth plea is eliminated. The only issues, therefore, upon which the cause could be tried, were those made upon the pleas of *non cepit*, *non detinet* and of property. Upon these issues appellee made satisfactory proof, appellant made none, and the verdict and judgment were for appellee. The entire argument of appellant is upon matters not before this court. We decline the discussion. The abstract furnished to us by appellant's counsel is so wretch-

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edly prepared we would have been entirely justified in affirming the judgment for want of an abstract.

The judgment will be affirmed.

Affirmed.

Watson Faulkner v. Katherine Birch.

1. ALLEGATIONS AND PROOF—*extent of rule requiring agreement between.* This rule applies as well to actions *ex delicto* as to those *ex contractu*.

2. VARIANCE—*when objection for, does not avail.* An objection for a variance will not avail unless interposed at the trial of the cause and unless at such time it was specific and pointed out the supposed variance.

3. CROSS-EXAMINATION—*when improperly restricted.* Cross-examination is improperly restricted where the time, place and circumstances concerning a material transaction testified to upon direct is not permitted to be examined into.

4. DRUGGIST—*duty of, in compounding prescriptions.* A druggist in putting up a prescription is not an absolute insurer; he is bound only to the exercise of ordinary care, though that care is in such case of a high character.

5. INSTRUCTIONS—*must not assume facts in dispute.* Instructions should not assume the existence of material facts in controversy.

6. INSTRUCTIONS—*must not single out evidence.* Instructions must not single out and give special prominence to particular evidence in the cause.

Action on the case. Appeal from the Circuit Court of Champaign County; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1904. Reversed and remanded. Opinion filed April 20, 1905.

A. D. MULLIKEN, for appellant.

L. A. WEAVER and RAY, DOBBINS & RILEY, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

The material averments of the declaration are that defendant, Faulkner, was a regularly licensed pharmacist and engaged in the business of conducting a drug store and pharmacy and the filling of medical prescriptions for hire; that plaintiff employed defendant to fill a prescription which

had been prescribed for her by a physician, which prescription called for an ingredient known as codeine; that defendant filled the prescription and plaintiff took the medicine so compounded by defendant; that defendant carelessly and negligently filled the said prescription by using an ingredient known as atropine instead of codeine; that atropine is a deadly poison and thereby plaintiff became sick, etc. Defendant pleaded the general issue. A trial by jury was had and a verdict rendered for plaintiff in the sum of \$1,700, upon which the court, after overruling defendant's motion for a new trial, entered judgment.

It appears from the proof on the part of plaintiff that defendant is a druggist in Champaign and that Dr. F. H. Powers, a physician of Champaign, was in attendance upon a Mrs. Johnston, who was ill of pneumonia. On January 30, 1904, he went to defendant's store and there wrote a prescription for Mrs. Johnston which Faulkner filled. The prescription called for codeine as an ingredient and stated on its face that it was for Mrs. Johnston. It was put up in capsules, a box of capsules was taken to Mrs. Johnston's home and some of the capsules were administered to her. Plaintiff is a trained nurse, and on the second day of February, by Dr. Powers' direction, began attendance on Mrs. Johnston as a nurse. On the fourth or fifth of February the capsule box by direction of Dr. Powers was sent to defendant to be refilled with the capsules, and was refilled by him and was taken to Mrs. Johnston's. On February 6th, plaintiff, being troubled with a cough, by direction of Dr. Powers took one of the capsules and shortly thereafter experienced the effects of atropine poisoning, and it appears without doubt that when the box was refilled atropine was used instead of codeine in recompounding the prescription. When plaintiff offered her proof showing for whom the prescription was made and filled and the circumstances under which plaintiff took the capsule, defendant made general objection, which was overruled. At the close of the evidence on the part of the plaintiff and again at the close of all the evidence, defendant in due form moved the

court to strike out the evidence in the case and to instruct the jury to find for the defendant, and the motions were overruled. In substance the grounds of the motions are, first, that the proof is variant from the averments of the declaration; second, that the evidence fails to establish a *prima facie* case; that the plaintiff failed to show any negligence on the part of the defendant. It is familiar doctrine that the *allegata* and *probata* must agree. A declaration is a specification in a methodical and legal form of the circumstances that constitute the plaintiff's cause of action. The declaration sets up a particular contract between the defendant and plaintiff, the negligent performance thereof by defendant, and the consequent injury to plaintiff. The proof made does not agree with the averments of the declaration. The declaration sets up facts in detail constituting a particular contractual relation entered into by the parties; the proof does not establish such relation but tends to establish only that general relation which exists between a druggist, a physician, and the public, arising out of the fact that the druggist is engaged in carrying on the business of compounding prescriptions. When a plaintiff avers particular facts descriptive of the transaction upon which he bases his action, he must prove them as laid, even though it is not necessary for him to aver such particular description, and this rule prevails not only in actions *ex contractu* but also in actions *ex delicto* when the gist of the action is the negligent performance of a contract. This rule, however, is for the benefit of the defendant and is one which, in a suit at law, he may waive, and which he does waive unless specific objection be made in apt time. The defendant when the evidence was offered, made merely general objection; general objection is sufficient for irrelevancy or incompetency but is not sufficient for variance. An objection for variance should be based upon that ground, and should specifically point out wherein the variance consists, otherwise objection to the evidence is deemed as waived. In such case a general objection is equivalent to no objection. The evidence, therefore, having been admitted with-

out objection, the court was not required at the conclusion of the plaintiff's proof or at the conclusion of all the proof to entertain the defendant's motion to strike out the evidence. Such a practice is not calculated to advance the administration of justice, and is promotive of confusion rather than clearness in the record. If objection had been made in due form and apt time, when the evidence was offered, plaintiff could then have amended her declaration, and if the amendment occasioned surprise to defendant, application could have been made and would have been granted for a continuance. No complaint was made that defendant was surprised nor was any application made for continuance. It is true the court in its discretion could have allowed the motion when made, and also have allowed the plaintiff then to amend her declaration, but it was not required so to do, and committed no error in denying the motion as to this ground. At the most it was matter of discretion. The second ground for the motion is that the evidence fails to show any negligence by defendant. It appears further, from the evidence on the part of plaintiff, that at the time defendant recomposed the prescription he had no more codeine in stock and sent to another druggist for six grains, and upon obtaining it discovered that the druggist to whom he applied had sent him two grains more than he ordered; that defendant then said that it was darker and coarser than that he had previously used, that it did not look like that he had been in the habit of using but that "he guessed it was all right" and thereupon used it in filling the prescription. Whether in such a case as this, proof of negligence other than of the mere fact of using atropine for codeine in compounding the prescription, be necessary to be made, in the first instance, in order to make a *prima facie* case for the plaintiff, we are not called upon to determine, and as to that question express no opinion. We think the evidence above mentioned was sufficient to warrant the court in submitting the cause to the jury. In compounding medicines the health and lives of the public may not with impunity be taken or injured by druggists

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who compound prescriptions with the degree of care manifested by such proof. As we understand, atropine and codeine, in some forms at least, look much alike; in such cases ordinary care on the part of the druggist requires a very great degree of care. The care required is to be measured by the danger that is manifest. The court did not err in denying the motion on the second ground.

It is urged by counsel for defendant, and we think with reason, that the court improperly restricted his cross-examination of witnesses and improperly denied him the right to introduce evidence. When defendant on cross-examination inquired of plaintiff "if it was one of the same lot of capsules that she had been administering to Mrs. Johnston" that she took, the court sustained plaintiff's objection. We cannot see upon what ground. Defendant was surely entitled to a full cross-examination of plaintiff as to time, place and circumstances concerning which she had testified. Defendant was a witness in his own behalf and was asked by his counsel to describe the appearance of the drug which he obtained from the other druggist, to state whether there is a general similarity in the appearance to the naked eye of atropine and codeine, whether by the naked eye he could distinguish atropine from codeine, and whether he had ever handled any codeine that had the same appearance to the naked eye as the drug he had obtained. Objections were sustained to all these questions. Defendant also called several druggists to whom numerous questions were propounded, the general scope of which was to show in what forms atropine and codeine were received by druggists, their color, shape, process of manufacture, similarity, how distinguished and the like, all of which examination was denied by the court. In substance the defendant was denied the right to show what care he did exercise. Unquestionably he had the right so to show; to show that he was guilty of no negligence in the premises if he could; to show the facts whatever they were. A druggist in putting up a prescription is not an absolute insurer; he is bound only to the exercise of ordinary care

though that care as before mentioned is of a high character in such case as this. There was serious error in refusing to admit proof by defendant upon the question of his alleged negligence.

The giving of instructions on behalf of plaintiff and refusing instructions offered by defendant is assigned for error.

The first instruction for plaintiff is not artistically drawn and is not entirely clear, but we cannot see that the jury were probably misled thereby. Upon another trial it doubtless will not be asked or given in its present form. The second instruction given for plaintiff is vicious throughout. It assumes that the defendant negligently filled the prescription; it directs the jury to find for the plaintiff if they find from the evidence that the prescription was not filled according to its terms; in substance it makes the defendant an insurer of the accuracy of his compounds. The third instruction is faulty in that it substantially tells the jury that if they find that defendant made a mistake in compounding the prescription by putting in atropine instead of codeine they should find their verdict for plaintiff. The fourth instruction is vicious for the same reason as is the third, and for the further reason that no proper statement is made therein of the care required of defendant. It is long, obscure, incorrect in statement and misleading.

The sixth instruction for plaintiff, which was intended to be simply on the matter of damages, is prefaced by obscure if not positively erroneous language concerning the question of defendant's alleged negligence. It should not have been given. There is no error in that part of the instruction that refers to the matter of damages. The seventh is also upon the subject of damages, is not subject to the objection referred to in the sixth, and is in proper form. The first refused instruction of defendant would have been perfectly correct if it had omitted the sentence relative to "negligence of some third party not the agent of defendant." As it stands it serves only to distract the attention of the jury from the precise question whether defendant

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was negligent. It assumes that "some third party" was not the agent of defendant, and it leaves the jury to determine what constitutes agency. The second of defendant's refused instructions is clearly bad. It assumes that defendant purchased the drug of a reputable pharmacist, it asserts that defendant had "the right to rely on the representation and warranty of the pharmacist that the drug delivered to him is the drug which he called for," and that "relying on such representation and warranty he would not be guilty of negligence." There is no proof of such representation and warranty, and if there were it would not as matter of law in and of itself release the defendant from the exercise of care himself. We are inclined to think the first clause of the third instruction is misleading in this case. It is: "The court instructs the jury that a druggist is not bound to exercise extreme or extraordinary care in the compounding of a prescription." He is bound to exercise only ordinary care, such care as is ordinarily possessed and exercised by members of his profession, but such ordinary care may require in a particular case, and did require in this case, extreme care. The remainder of the instruction correctly states the rule of law applicable to the case. The third instruction is: "Proof that the defendant did not use the drug specified in the prescription in compounding the same, and was mistaken as to the real nature of the drug he did use is not evidence of negligence on his part and you should not infer negligence on the part of defendant from that circumstance alone." The purpose of instructions is to inform the jury what principles of law are applicable to the facts which they may find disclosed by the evidence. Instructions may not determine the weight of the entire evidence or of any part of the evidence; the weight of evidence is wholly a matter for the jury. It is not proper practice to single out a portion of the evidence and instruct the jury that such evidence is insufficient upon which to render a particular verdict. If such practice were to be indulged in, then it would be proper to single out in a second instruction another item of evidence and give the same instruction as to that, and

so on as to every item or combination of items of evidence in the case. Such a practice instead of enlightening a jury would simply confuse and befog. The jury are to determine the issue from a consideration of the evidence in the whole, not in parcels. There was no error in refusing the instruction. The fourth and fifth of defendant's refused instructions are obviously bad. Appellant does not defend them and they are indefensible.

It is also urged that the damages assessed by the jury are excessive. We are inclined to think the damages are large, but we would hesitate to reverse this judgment on that ground.

For the errors indicated the judgment will be reversed and the cause remanded with leave to the plaintiff to amend her declaration as she may be advised.

Reversed and remanded.

Victor Coal Company v. Charles Dunbar, by next Friend.

1. REMOVAL OF DANGER—*how question of reasonable time for, determined.* What is a reasonable time during which the servant may continue in his employment under a promise of his employer to remove the danger complained of, is, ordinarily, a question for the jury, and in the determination of the question all the facts and circumstances of the case are to be taken into consideration.

Action on the case for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

CONKLING & IRWIN, for appellant.

J. A. BLOOMINGSTON, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

Reversal of this judgment is asked for upon two grounds and only two grounds, one of which is that the trial court erred in refusing at the close of the proof in chief on the part of appellee, and again at the close of all the proof, to

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instruct the jury to find the defendant, the appellant, not guilty; and the other of which is that the verdict is against the preponderance of the evidence. The first proposition is that the record shows, as a matter of law, that a verdict for the plaintiff cannot be sustained, and the second is that while there may be some evidence to sustain his case, the greater weight is against it. There is no complaint of the ruling of the court in admitting and refusing evidence offered, nor the action of the court in giving or refusing instructions other than as above stated, nor as to the amount of the verdict. The sole complaint is with regard to the existence and weight of evidence.

The suit is in case for a personal injury received by plaintiff while in the employment of defendant as a mule driver in the coal mine of defendant. Appellee was eighteen years of age at the time he was injured. The declaration charges that the mule which plaintiff was directed to drive was vicious and not reasonably safe to drive, that plaintiff complained to the pit boss of the vicious, violent and dangerous character of the mule and was by him promised another and a safe one, and thereupon by reason of the promises made to him, he continued for a time to drive the mule, and while so doing and himself exercising due care, it ran away, threw him out of the car, and injured him so that it became necessary to amputate his left leg above the knee.

It is urged by appellant that the proof shows conclusively that the plaintiff had assumed all risk of injury to himself from the vicious character of the mule, and that therefore the refused instruction should have been given. The ground for the argument that the plaintiff had assumed the risk is in substance, though not in terms, that he had been promised another mule so many times by the pit boss and without fulfillment, that he must have known that no reliance was to be placed on the promises; must have known that they were made with no intention of fulfillment; must have known that they were false; that consequently plaintiff did not rely on them, was not authorized to rely on them, and

therefore was proceeding at his own risk and has nobody to blame but himself. The argument under the circumstances shown by the evidence is not very persuasive. The evidence does show that the plaintiff complained daily to the pit boss for several days before the accident, of the vicious character of the mule, that he was always promised another, that on the day of the injury he again complained to the mine manager and was told to go on and he would be furnished with another, and that he thereupon continued to drive it that day still with the expectation of getting another, and on his last trip for the day suffered his injury. Appellant in its argument asks the question: "What, then, was the time during which appellee was warranted in expecting a performance of the promise of appellant?" We have been furnished by appellant with argument upon this one question of fourteen pages in which many cases of divers jurisdictions are cited and quoted, and it is argued that this not being a case of making repairs in machinery, tools and the like, the promise could have been fulfilled immediately by giving appellee another mule, yet the proof shows that all the mules defendant had on hand were then in actual service. Defendant knew that the only way to get another mule for plaintiff to drive was to first get another mule, and we must presume that it would take some period of time to get another fit to drive in the strange surroundings of a coal mine. It is also argued that "the rule of exempting an employee from assuming the risk when a promise to repair is made, does not apply in ordinary labor which only requires the use of implements and instrumentalities with which the employee is entirely familiar," and we are cited to cases where the servant injured was engaged in ordinary labor and using tools of simple construction as authority to be applied in this case where the tool to be used was a mule. We are not inclined to spend time in discussing the question whether a vicious mule is a simple tool. So far as we are advised no ordinary man has ever become "entirely familiar" with the creature known as mule. It is not argued or claimed that the danger in driving the mule was so great that no reasonably prudent person would have un-

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dertaken to do so. That question does not arise. What is a reasonable time during which the servant may continue in his employment under a promise of his employer to remove the danger complained of, is ordinarily a question for the jury, and in the determination of the question all the facts and circumstances of the particular case are to be taken into consideration. No two cases are alike. What might be a reasonable time under one state of facts might be wholly unreasonable under another and different one. The most that can be said is that in each case it must be reasonable, and it must be left to be applied whether by court or jury to cases as they arise in such manner as reason and justice seem to require. After careful perusal of the evidence in this cause we are not of the opinion that the court erred in refusing to instruct the jury to find for the defendant. On the contrary, it is our opinion that so to instruct would have been error. It would serve no useful purpose for us to quote at length the evidence in this record pertinent to the question whether the plaintiff was justified in relying on defendant's promise to furnish another mule. Indeed, it would be difficult to give a correct idea of that proof without furnishing substantially the evidence in the case. In our judgment, under the evidence disclosed by this record, the plaintiff was not unwarranted in relying upon the promises made to him.

The second ground upon which it is claimed the judgment should be reversed is, that the verdict is contrary to the weight of the evidence. This record is like most every other containing the evidence offered in a trial by jury, in this, that the evidence is conflicting. In such case we cannot justly reverse upon the ground now urged unless it clearly appears that the preponderance of the evidence is in favor of the defeated party. The mere printed words give but a very imperfect basis upon which to estimate the value of the testimony. The evidence appears to justify the verdict. We find no error of law.

The judgment will be affirmed.

Affirmed.

Pekin Telephone Company v. Farmers Telephone Company.

1. **MOTION TO DISSOLVE**—*appeal lies from interlocutory order denying.* An appeal lies from an interlocutory order denying a motion to dissolve an injunction.

2. **INJUNCTION**—*upon what relief by, must be predicated.* Relief by injunction can only be predicated upon the allegations of the bill; matters which might have been relied upon cannot be considered unless alleged.

3. **INJUNCTION**—*when properly sustained.* Where, upon a motion to dissolve, a *prima facie* right to the injunction is shown, it is properly continued in force where hardship would result from a dissolution, and this notwithstanding such *prima facie* showing is contradicted by the affidavits of the defendant.

Bill for injunction. Appeal from the Circuit Court of Tazewell County; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

STEVENS & HORTON and GEORGE C. RIDER, for appellant.

JESSE BLACK, Jr., for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

Appellee, the Farmers Telephone Company, filed the bill of complaint herein. Both parties are telephone corporations. The substance of the bill so far as material to this consideration is, that the Pekin Company was organized in June, 1900, has a central office and switch-board in Delavan, Tazewell county, through which connections are made with other lines of other companies and with toll lines of its own. The Farmers Company has an exchange in Hopedale and has 230 subscribers; that prior to the construction of the plant of the Farmers Company it "agreed and arranged with and obtained permission from the said Pekin Telephone Company for connection with said company at its exchange in the city of Delavan without any restriction other than that your orator and subscribers would pay to the said Pekin Telephone Company the usual, customary and reasonable exchange and toll charges and

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make the usual and customary division of tolls for the services rendered to the subscribers of your orator by the said Pekin Telephone Company;" that pursuant to said agreement the Farmers Company constructed and equipped its plant at a cost of \$5,000; that it procured the subscribers to its capital stock and telephone system upon assurances of connection with the telephone system of the Pekin Company and its connecting lines; that pursuant to its agreement with the Pekin Company, the Farmers Company constructed a line from its central office to Delavan and there connected its lines with the Pekin Company lines and proceeded to transact business through the Pekin Company exchange with subscribers on the lines and connecting lines of the Pekin Company and that toll charges were settled between the two companies agreeable to both; that the Minier Telephone Company has constructed a telephone system in the counties of Tazewell and McLean with exchanges at Minier, Hopedale and other places and lines connecting its exchanges with the exchange of the Pekin Company at Delavan and for a year past has been doing business through the Pekin Company exchange; that "under and by the agreement and understanding between your orator and the said Pekin Telephone Company, your orator and its subscribers were entitled to have and were to be provided by the said Pekin Telephone Company with the same connections and privileges of communication as is and has been accorded by said Pekin Telephone Company to the said Minier Telephone Company;" that said Pekin Company and Minier Company have combined and agreed with each other to disconnect the lines of the Farmers Company from the exchange of the Pekin Company at Delavan, and that said Pekin Company in pursuance of said combination threatens to make such disconnection; that the Farmers Company and its subscribers have paid all tolls exacted by the Pekin Company and are ready to comply with all reasonable rules of the Pekin Company and to pay all reasonable tolls in the same manner and to the same extent as are enforced against other

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connecting lines of the Pekin Company; that if the Pekin Company carries out its said threat to disconnect the Farmers Company's lines, the Farmers Company and its subscribers "will suffer irreparable damages, loss and injury and will thereby be rendered unable to keep its said agreement with the subscribers of stock and subscribers of service and will be unable to give and provide to the subscribers of your orator the telephone service that it was contemplated and understood they should have when your orator was organized and when its telephone service was installed and equipped and connections made with the said Pekin Telephone Company; that the injury and damage that your orator and its subscribers will sustain will not be susceptible of computation and cannot be definitely ascertained and cannot be compensated or based upon a money consideration, and your orator will be liable to be thrown into expensive and extended litigation and subjected to numerous and annoying suits and litigation."

Appellant made answer to the bill and entered its motion to dissolve the injunction, which was heard by the court on bill, answer and affidavits presented by the respective parties, and the motion was denied. This appeal is taken from the order of the court refusing to dissolve the injunction.

It is first suggested that the order is not one from which appeal may be taken; that so much of the act of 1887 as provides for appeals from orders overruling motions to dissolve injunctions, is void by reason of not being within the scope of the title of the act. This general question has been considered by the Supreme Court in numerous cases. *The People v. Wright*, 70 Ill. 388; *Johnson v. The People*, 83 Ill. 431; *Hudnall v. Ham*, 172 Ill. 76; *Bobel v. The People*, 173 Ill. 19, and others. We deem it unnecessary in this case to enter into discussion of the question. It appears clear to us that the subject of the act is the matter of appeal from interlocutory orders in chancery; that the subject is expressed in the title and that consequently the provision in question is not obnoxious to the objection made.

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It is claimed by appellee in its argument that there are two grounds upon which the relief sought may be maintained: first, a threatened breach of contract whereby irreparable injury would arise to appellee and its subscribers, and, second, an obligation resting upon defendant independent of contract and arising out of the nature, character and purposes of creation of such corporations to furnish to complainant the connections and facilities now existing. Complainant either formed its connection by agreement as alleged, or in pursuance of some authority given by some process or proceeding at law, else it has no claim or right whatever in the premises. The bill is framed wholly upon the theory of contract relation. It alleges the existing relations of connection to have arisen in pursuance of an agreement made between the parties. Complainant having placed its claim to relief upon the basis of an agreement, it must abide by it so far as this hearing is concerned. The *allegata* and *probata* must agree. The averments of the bill as to the contract are very general. It is argued by appellant, and with much force, that the averments do not show any contract relation, that the elements of a contract are not set forth, that no period of the existence of the alleged contract is set up nor any consideration therefor, and that at the most the averments show a mere license revocable at the will of appellant. The bill does aver that the Minier Company had been permitted by defendant to form connection with it and then was and for one year had been in such connection and that by the agreement between complainant and defendant, complainant was to be provided by the Pekin Company with the same connections and privileges as had been given to the Minier Company. The bill does not set up matters constituting a consideration adequate in a court of equity. Although the bill manifestly is very general and vague in its statement of the terms of the contract, we are inclined to think that it is not subject to the objection, that it shows no equity upon its face.

It is also urged by appellant that no such showing was

made on the hearing of the motion to dissolve as warrants the continuance of the injunction, and that this court therefore should order its dissolution.

The bill is sworn to and is supported by affidavits; the answer also is sworn to and supported by affidavits. The bill and affidavits on one side are flatly contradictory of the answer and affidavits on the other side. In such case we are inclined to give due consideration to the action of the Circuit Court. Considering appellee's proof alone it does appear that the alleged contract was made and that the connection was made in pursuance of and relying upon it, that money was spent by appellee upon the faith of it, and that appellee had kept its part of the contract, and when all the proof is considered it appears that to allow appellant forthwith to disconnect would work hardship to appellee, and it is not apparent that any harm can come to appellant by the maintenance of the injunction until the final hearing.

Entertaining these views the order of the Circuit Court will be affirmed.

Affirmed.

The City of Gibson v. Belle Murray.

1. INSTRUCTION—*when inaccuracy of, harmless error.* The inaccuracy of an instruction will not reverse where its meaning is indicated by the series of instructions given and where the evidence is of such a character as to negative any inference of harm resulting.

2. INSTRUCTION—*upon suffering, not erroneous.* Notwithstanding an instruction in an action for personal injuries may not with technical accuracy limit the right to allow damages for pain and suffering, to that which arises by reason of the injury complained of, yet if such inference follows from a reading of all instructions given, reversal will not follow.

3. ORDINANCE—*what improper in action for injury resulting from sidewalk.* In such a case it is improper to admit an ordinance which provides that the street superintendent "shall see that the same (streets) are kept in good and safe condition of repair."

4. EVIDENCE—*what, proper, upon question of damages.* Evidence

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of a surgical operation upon the plaintiff performed after the institution of the suit, is competent.

5. REMARKS OF COUNSEL—*when, will not reverse.* Improper remarks of counsel in argument will not reverse where objection thereto has been sustained and the jury directed to disregard the same, and the jury apparently did so.

6. EXECUTION—*when award of, improper.* The award of an execution against a municipal corporation is improper.

Action on the case for personal injuries. Appeal from the Circuit Court of Ford County; the Hon. ROBERT HILSCHER, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

CLOUD & THOMPSON, for appellant.

L. A. CRANSTON and A. L. PHILLIPS, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

This is a suit by Belle Murray against the city of Gibson for the recovery of damages for injuries received by her by reason of the alleged negligence of the city in permitting a certain sidewalk within the city to become out of repair, by means whereof she, in passing over the same, fell and was hurt. Upon a trial by jury a verdict was rendered for plaintiff in the sum of \$3,000 upon which the court, after overruling a motion for a new trial, entered judgment. The sidewalk when built consisted of three stringers and planks laid crosswise thereon. At the time and place where the accident occurred several of the planks had become entirely loose from the stringers and lay lengthwise of the walk across the opening. There was a ditch of the depth of from eighteen inches to three feet beneath these loose planks. The space which had been covered by these loose planks was of the width of three to four feet. As the plaintiff was walking over this place, one of the boards turned or flew up and she went down astride the board with her feet down in the ditch but not touching the bottom and she was severely injured.

Our attention is called by counsel for appellant to several alleged errors, to all of which we have given consideration. It is claimed that the first instruction given for

plaintiff informs the jury that it was the duty of appellant to keep the sidewalk in question "in good and safe condition." We do not so read the instruction. It states that it was the duty of the city to use all reasonable care to keep the walk in good and safe condition, and it conditions the finding by the jury of negligence on the part of the city upon their finding that the city did not use reasonable care to keep the walk in good and safe condition and that thereby the walk became defective and unsafe. The instruction is not precisely accurate. It should read that the duty of the city was to use reasonable care to keep the walk in reasonably safe condition, but when the entire series of instructions given in the cause is read, it appears clear that the jury could not have been misled by the inaccuracy in plaintiff's first; and when the evidence bearing upon the subject of negligence of defendant is read, it becomes certain that defendant received no harm from that defect in the instruction. The proof on the part of plaintiff shows beyond controversy, and there is none by defendant to rebut it, that the walk was in loose, broken-up and dangerous condition and had been so for a year or longer, that the city had actual knowledge of its condition, that its street superintendent had been notified of its condition and requested to fix it more than a year before the plaintiff was injured. It is manifest from the evidence not only that the walk was not in good and safe condition, but that it was in very bad, unsafe and dangerous condition, and had been by the city so allowed to remain after actual knowledge thereof and more than abundant time to repair it. Under such condition of proof it would be trifling with the rights of citizens to reverse and remand this cause for another trial on account of the alleged error in that instruction.

In this connection it is also urged as error that the court allowed plaintiff to introduce ordinances of the city of Gibson in evidence, which prescribe as among the duties of the street superintendent over streets, alleys and sidewalks, that he "shall see that the same are kept in good safe con-

dition of repair." The ordinances should not have been admitted, but what has been above said relative to the instruction complained of applied with equal force to the matter of admitting the ordinances.

Upon the matter of the damages found by the jury, it is contended that the court erred in giving plaintiff's third instruction, and also in admitting evidence of a second surgical operation performed upon plaintiff after the suit was begun; and that counsel for plaintiff in his discussion to the jury used improper language calculated to arouse the prejudices of the jury and unjustly increase the amount of the verdict. The plaintiff's third instruction informs the jury that if they find the issue for the plaintiff, "then the jury have the right to find for her such an amount of damages as the jury believe from the evidence will compensate her for the personal injury so received and her expenses necessarily incurred in respect thereto, if any such expense has been proved, and also for the pain and suffering undergone by her, if any is proved by the evidence." The criticism made of the instruction is that it does not limit the recovery for pain and suffering to that which was produced by the injury. Technical precision would require the insertion of the words "by reason thereof" after the word "her" in the last line of the instruction. We cannot see that the jury were probably misled by this instruction. Any ordinary person reading the instruction would understand that the only damages to be taken into consideration were those originating in, produced by, resulting from, the injury received. Moreover the instructions given in behalf of defendant fully, sharply and repeatedly defined the limits within which the consideration of the jury should be confined in arriving at the damages, and directed that plaintiff in no event would be entitled to recover anything for any injury, illness, suffering or expense not shown by a preponderance of the evidence to have been produced or incurred in consequence of and as the proximate result of plaintiff's fall. We discover no error committed by the court in admitting proof by the surgeon of the second op-

eration performed, and what conditions he then found in plaintiff, and their cause, in his opinion.

The remark made by counsel was: "If this suit had not been brought until after the second examination the damages would have been ten thousand dollars." Defendant's counsel objected to the remark, and the court then stated to the jury that it was altogether improper and directed them to disregard it. We do not think that the amount of the verdict indicated that the jury were in any degree influenced by the remark in arriving at the verdict. They seem to have followed the direction of the court and disregarded it.

At the request of the defendant the jury were required to make answer to the following interrogatory: "Could the plaintiff, by the exercise of due and ordinary care as defined in the instructions given you, have avoided the fall and injury mentioned in her declaration and the evidence?" To which interrogatory the jury returned the answer "No." We are requested to reverse this judgment on the ground that plaintiff was guilty of negligence at the time of her injury. In view of the general verdict of the jury, their special finding upon the above-mentioned material question of fact, and our careful consideration of the evidence in the case, we are compelled to refuse the request. The court awarded execution against the defendant. This was error, but such as may be and will be corrected in this court.

The defendant was guilty of great negligence, the plaintiff was very seriously injured thereby, has suffered and still suffers great pain therefrom, has been twice subjected to the surgeon's knife and compelled to be at large expense in attempting to be cured. The verdict is not unreasonably large. No substantial error was committed in the trial of the cause. The judgment is right except in awarding execution. In that respect it will be corrected here and the Ford County Circuit Court directed to amend its record to the same effect, and as so corrected the judgment will be affirmed.

Affirmed.

**Northwestern National Life Insurance Company v.
Nellie D. Brooker, Administratrix.**

1. **INSURANCE POLICY—when lapsed.** Where the premium upon an insurance policy is due and unpaid at the time of the death of the insured, it is deemed to have lapsed where such policy provides that no liability shall exist on account thereof if the insured dies in default.

Action of assumpsit. Appeal from the Circuit Court of Adams County; the Hon. ALBERT AKERS, Judge, presiding. Heard in this court at the November term, 1904. Reversed, with finding of facts. Opinion filed April 20, 1905.

BROWN & KERE and VANDEVENTER & WOODS, for appellant.

MATTHEW F. CARROTT, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

This suit is by appellee, Nellie D. Brooker, against the appellant insurance company on a policy issued by it upon the life of Albert S. Brooker. The cause was by agreement of parties tried by the court without a jury, and a finding was made for the plaintiff and judgment entered thereon. By the terms of the policy the insured was to pay on or before the first day of each month a premium of \$2.50. It is also provided by the policy that the "non-payment of any premium when due shall forfeit all premiums paid on the policy and terminate the liability of the company thereunder, except as hereinafter provided." The exception above quoted has reference to the following provision in the policy: "This policy may be reinstated, during the life of the insured, at any time within twelve months of the date of lapse, by the payment of all past due premiums, and a fine of ten per cent. per annum on such over-due premiums." The insured retired to his bed on the evening of July 3, 1903, and was found dead in his bed the next day.

The only question for our determination is whether the policy was in force at the time of Brooker's death.

It appears by a letter from the cashier of the company to Brooker of date June 5, 1903, and offered in evidence, that Brooker on the 4th day of June had sent the company a check for \$5.02 to pay the over-due premium for May and June, which check was accepted by the company as such payment. Proof was admitted by the court over appellant's objection, that O. W. Brooker also had a policy in appellant company and that he "usually paid his premiums sometime after they were due by the terms of the policy." It is agreed by the parties that on July 17, 1903, appellee sent to appellant \$2.50 to pay the premium due July 1st on the policy, and the company refused to accept the money and returned it. It is conceded by appellee that by the terms of the policy it had lapsed or become forfeited at the time of Brooker's death, but it is claimed that by its course of conduct the company waived its right to insist upon payment at the precise time fixed by the policy and is estopped to claim a forfeiture. We are unable to find any proof in the record sustaining this claim. The insured paid the premiums for May and June after they were due by the terms of the policy. He paid \$5.02. We conclude the two cents were intended for and accepted as the ten per cent. per annum fine on the over-due premiums as provided by the terms of the policy above quoted. The insured by the terms of the policy had the right to make such payment any time within twelve months after his default in payment. The company in accepting the same was not waiving any provisions of its policy but was conforming thereto and simply doing what the insured had the right to demand of it. As to the proof of receipt of premiums from O. W. Brooker, on his policy after due, the same statement may be made. Whether a so-called fine was exacted from O. W. Brooker does not appear and is of no significance in any event. Whether his delay of payment was one day or one month, whether his fines would amount to one cent or more does not appear. Whatever they were and whether or not they were demanded or paid could avail nothing to the plaintiff in this case. The question of waiver of forfeiture by waiving payment of fines does not

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arise here. When the insured failed to pay the premium due July 1st, he knew he could pay it with a trifling fine in addition any time within twelve months and his policy would be again good. He also knew that if he did not pay when due and should die without payment that his policy was absolutely gone, that no payment could be made by anyone after his death which could restore life to it. He was not deceived or misled in any manner by the defendant company. He took the risk voluntarily and with full knowledge. No cause of action was established.

The judgment will be reversed.

Reversed.

Finding of facts, to be incorporated in the judgment of the court:

We find that the insured failed to pay the premium due July 1, 1903, and died not having paid such premium, that thereby the policy became void and plaintiff established no cause of action.

**Farmers & Threshers Mutual Insurance Company v.
C. E. Koons.**

1. **PLEA**—*must be certain.* A plea which is self-contradictory is properly overruled on demurrer.

2. **INSURANCE POLICY**—*when plea does not show lapse of.* A plea which undertakes to set up that the policy has lapsed because of default in the payment of premium notes, is bad, where it avers that payment of such notes was to be made "at such time and in such sums as the board of directors may require," and does not aver that the board of directors, as such, have ever made requisition upon the plaintiff for the payment of the whole or any part thereof.

Action of assumpsit. Appeal from the Circuit Court of DeWitt County; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1904. Affirmed. Opinion filed April 20, 1905.

J. W. HOWELL and JOHN FULLER, for appellant.

HERRICK & HERRICK, for appellee.

MR. JUSTICE GEST delivered the opinion of the court.

This is a suit on a policy of insurance issued by appel-

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lant to appellee, Koons. The only question in the case is whether the court erred in sustaining a demurrer to the following plea:

"And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against it, the defendant, because it says that the alleged policy of insurance in the plaintiff's declaration mentioned was given to the said plaintiff in consideration of a certain premium note for the sum of Fifty-two and 20-100 Dollars; and the defendant says that by the stipulation VII in said policy of insurance, which is as follows, to wit: 'This policy is given in consideration of a premium note or notes for the sum of Fifty-two and 20-100 Dollars, the receipt of which is hereby acknowledged, and the insured agrees, that, if it should become necessary, to pay the whole amount of the same at such time and in such sums as the Board of Directors may require. And it is agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any premium note, or notes or obligations, given for the premiums, or any calls thereon remain past due and unpaid.

Payments of notes and calls thereon must be paid to this company at its home office in Paris, Illinois, or to a person or persons specially appointed to collect the same for said company.

And it is agreed that the failure of the insured to receive the notices that may be sent by this company of the approaching maturity of any note or notes, or any other obligations, or any calls on notes, shall not operate to render this company liable for any loss or damage that may occur while said note or notes, or obligations thereon, or other obligations remain past due and unpaid.

This company may collect by suit or otherwise the premium note or notes and the calls thereon or any other obligations from the said home office for the payments of any note or notes or obligations past due, and calls thereon, or obligations must be received by the insured before there can be a revival of this policy, such revival to begin from the said time of payment and at no time to carry the insurance beyond the end of the original time of this policy.

In settlement of any loss in this policy this company may deduct therefrom the entire amount of any unmaturing note given wholly or in part as a consideration of this policy whether such notes are payable on call or otherwise.'

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It was agreed by and between the plaintiff and the defendant that the said company should not be liable for any loss or damage that might occur to the property mentioned in said policy while any premium note or notes or obligations given for the premium or any calls thereon remain past due and unpaid; and the defendant further says that one of the said premium notes and obligations given for said premium, is dated the 31st day of October, 1902, for the sum of Twenty-eight and 40-100 Dollars, and payable January 1, 1903, after date, at the office of said company in Paris, Illinois, with exchange, for value received, with six per cent. interest from date until paid, which said note was to be void and of no effect if policy is not issued. And which said note and obligations were long past due and unpaid at the time of the alleged loss and damage to said property, and that the plaintiff although often requested had not paid said premium note and obligations, but wholly neglected and refused so to do; and this the defendant is ready to verify. Therefore he prays judgment if the plaintiff ought to have his aforesaid action against it."

The plea is contradictory and wholly uncertain. It attempts to set up default of the plaintiff in the payment of some premium note or notes whereby the policy became void. It avers one particular note as given for the entire premium, then mentions another for a smaller amount as a premium note, and then avers default in payment of "which said note and obligations." The plaintiff could not intelligently make reply to it. But assuming that the plea does set out by proper description the note, notes or obligations given for the premium, it nevertheless is bad. It sets up that plaintiff was to pay the same "at such time and in such sums as the board of directors may require," but it nowhere appears by the plea that the board of directors as such have ever made requisition upon plaintiff for the payment of the whole or any part thereof. Insurance contracts are to be taken most strongly against the insurer, and pleadings are to be taken most strongly against the pleader. The court did not err in sustaining the demurrer and the judgment will be affirmed.

Affirmed.

CASES
DETERMINED IN THE
SECOND DISTRICT
OF THE
APPELLATE COURT OF ILLINOIS
DURING THE YEAR 1905.

**Chicago, Rock Island & Pacific Railway Company, et al.,
v. The People, ex rel. R. A. Culter, et al.**

(Gen. No. 4,423.)

1. **ADMISSIONS**—*effect of, contained in answer.* Admissions made in an answer not sought at any stage of the proceedings to be amended, are binding upon the defendants making them.

2. **STREET**—*what amounts to grant by municipality of an illegal exclusive use of.* The grant by a municipality to a railroad company of a right to construct and maintain tracks, sidings and switches in a public street, and likewise to construct and maintain therein a brick and stone depot, together with other structures, amounts to the grant of an exclusive use of a part of such street, and is illegal.

3. **STREET**—*limit of power of municipality to grant use of, to railroad company.* The power to grant the right to a railroad company to use a street does not carry with it the power to authorize such company to obstruct the street so as to deprive the public and adjacent property owners of its use.

4. **STREETS**—*what does not justify illegal grant of use of.* The grant of an exclusive use of a portion of a public street is not justified by the fact that enough of such street is left unobstructed to accommodate public travel, nor by the fact that the business interests of the municipality desire the improvement proposed by the ordinance, nor by the fact that the authorities of the municipality and numerous citizens thereof may have thought that the grant of such use would be to the best interests of the municipality.

5. **STREET**—*when equity has jurisdiction to restrain illegal use of.* A court of equity has jurisdiction, at the instance of the state's attorney, to restrain the illegal use of a public street by a railroad company.

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where such use, if permitted, would constitute a purpresture or public nuisance.

Injunctional proceeding. Appeal from the Circuit Court of Peoria County; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed April 25, 1905.

STEVENS & HORTON, for appellants.

W. V. TEFFT, SHEEN & MILLER, H. MANSFIELD and J. M. RICE, for appellees.

MR. PRESIDING JUSTICE FARMER delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Peoria County declaring void a certain ordinance passed by the City Council of the city of Peoria in November, 1898, and enjoining appellants from exercising any rights or privileges under it. The ordinance gave permission to the Chicago, Rock Island & Pacific Railway Co. and the Rock Island & Peoria Railway Co., their successors and assigns, for a period not to exceed fifty years, in consideration of the annual payment of \$500 "to rearrange and reconstruct their existing tracks, and to construct additional tracks, spurs, sidings and switches in and upon Water street and the public grounds lying between Water street and the Illinois river and between Fayette street, produced on the east, and the land owned by said companies at the foot of Fulton street, produced on the west," according to plans shown by a plat attached to the ordinance. The ordinance also authorized said companies "to construct and maintain upon said public grounds, and use, for the purpose of a passenger depot, a permanent stone and brick building with such necessary and convenient sheds, platforms and tracks in connection therewith as the said companies, their successors and assigns, shall deem necessary."

The ground referred to lies between the front of blocks 1, 2, 3 and 4 in the city of Peoria and the Illinois river. It is of irregular width, varying from 200 to 250 feet, and is 1,200 feet long. Said blocks front on Water street which

is a public street and extends in a northeasterly and southwesterly direction along and parallel to the river front. For many years prior to the passage of the ordinance, 110 feet of the space between the river front and the blocks mentioned, and next to said blocks, had been used and traveled as a street. The remainder of the space was, it appears, not used for travel along Water street, but was used as a boat landing or levee and, as alleged, as a kind of storage or "dumping ground."

Several years before the passage of the ordinance in question, by permission of the city, certain railroad tracks were laid in Water street by appellants upon and along the southerly side of the 110 feet used for street travel, but these tracks are not involved in this litigation.

It is contended by appellants in their brief and argument that Water street embraces only the 110 feet next to the blocks before mentioned, and that the remainder of the ground between that and the river front is "ground held by the city as a levee or land for wharfage purposes."

Appellees contend that all the territory between the property front on the northerly side of Water street and the river, is Water street, and the bill asks that the ordinance be declared illegal and void and that appellants be enjoined from exercising any rights or privileges thereunder.

The bill is filed in the name of the People by the state's attorney, and a number of individuals, some of whom are owners of property fronting on Water street and some of whom are engaged in river traffic as common carriers, join as complainants and allege that their property and business are injured and damaged by the use and occupation of the land in dispute by appellants. It does not directly aver that all the territory within the limits mentioned is Water street. The averments are that it was held and used and recognized by the city of Peoria "as a public street and public boat landing, public harbor and public wharf or public levee."

Appellants by their answer admit "that all of said

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ground lying between the present northerly line of Water street as indicated by the curbing and the river, was and is a part of Water street, * * * deny that there was any limit to the width of Water street except such as was contained between what is at the present time the north-westerly line of Water street and the river, but its depth was limited between the boundaries aforesaid," and "deny that any of the land ever was held by the County Commissioners or the county of Peoria or the city of Peoria as and for a boat landing; that such land was, is and ever has been a part of Water street as originally laid out and platted." The answer further denies that the portion of Water street next to the river has been used exclusively as a boat landing and denies that there ever has been any limitation to the width of Water street as cared for by the city of Peoria, or that there ever has been "any recognition of the rights of the river front as a landing place or levee except by sufferance, or that any use thereof has in any manner changed or tended to change the character of the ground or make it anything but a street owned by the city of Peoria and under the control of the city authorities of the city of Peoria to the same extent as any and all other streets of said city."

After replication filed the cause was referred to the master in chancery to take the testimony and report his conclusions of both law and fact. The master found and reported that appellants had taken possession of the strip of ground described in the ordinance, had rearranged and reconstructed their tracks, built new tracks, sidings and switches "and are now using said ground as a railroad yard, for switching, unloading, loading and the storing of freight cars." He further found the ground described in the ordinance is a part of Water street, that "Water street contains all the ground between the front row of blocks and the river or lake, and was granted to the town of Peoria and dedicated by the County Commissioners, who laid out the town, for public purposes." He also finds that all the streets of Peoria were laid out 100 feet in width, except

Water street, which was extended to the river, and that "the increase in the width of it, by the Commissioners, clearly indicated their intention to make it serve the purpose of a public landing in addition to its ordinary uses as a street; that the effect of the ordinance was to give appellants, without a petition of the owners of more than one-half of the land fronting on the portion of the street sought to be taken, the exclusive use and control of the portion of Water street embraced within its terms for a period of fifty years, and that the city of Peoria had no power to dispose of the use, control and occupancy of any portion of Water street and the public landing which is a part of the same, as was attempted by the ordinance. He, therefore, finds and so reports that the ordinance is void and recommends that a judgment of ouster be rendered against appellants.

Appellants filed objections to the report before the master, who overruled them, and the same objections were filed as exceptions in the Circuit Court, where they were by the court overruled and the report of the master approved in all respects except as to the recommendation that a judgment of ouster be entered. The court found that the findings of fact reported by the master were sustained by the pleadings and proofs and decreed the ordinance to be illegal and void, that appellants acquired no legal rights by virtue of it, and that the exercise of their pretended rights under it created a public nuisance and a purpresture upon the premises described and granted in and by said ordinance, and perpetually enjoined the exercise of any rights or powers under or by virtue of it, from which this decree is prosecuted.

There was no specific objection or exception to the finding of the master that the land in controversy is a part of Water street. The nearest approach to it is exception number one, which is, "That said report is against and is not supported by the evidence in the case." Nor is the finding and decree of the court upon this proposition directly questioned by the assignment of errors. Appellants confine the

discussion in their brief and argument almost exclusively to questions of law. They say: "The questions arising are not so much upon any disputed facts, as questions of law."

A material question to be determined in arriving at a decision of this case, is, whether the land embraced in the ordinance is in, and a part of Water street. Whatever of ambiguity there may have been in the allegations of the bill upon that subject, we are of opinion appellants are bound by the numerous and emphatic allegations of their answer above quoted that it is a part of said street. They did not, when apprised of the finding of the master, ask leave of the court to amend their answer on the ground that the admissions were improvidently, or, as stated in their brief, erroneously made, and move the court to direct that the admissions be treated as no part of the record. Having elected to stand by their answer until the final decree was entered, we think they are now concluded by it and cannot be heard to say that the ground in controversy is not a part of the street. *Maher v. Bull*, 39 Ill. 531; *Wood v. Whelen*, 93 Ill. 153; *Home Ins. Co. of Texas v. Myer*, Ib. 271; *Fielding v. Fitzgerald*, 130 Ill. 437; *Jewett v. Sweet*, 178 Ill. 96.

Had the city council then, the power and authority by ordinance, and without the petition of a majority of the owners of the frontage, to grant to appellants a part of a public street for the uses and purposes in said ordinance set forth? We do not understand appellants to contend that they would have the right to authorize such use of a public street. They say in their brief and argument: "We lay considerable stress upon the character of the property in controversy, because we do not consider that the same rule applies to it as applies to the streets of a city." Again they say the character of the place in controversy "should make a vast difference in the consideration of the court, because if it is a public street, properly, every citizen has a right to use it throughout its entire length and breadth and height." If we are correct in our conclusion that the pleadings and proofs warranted the

finding of the master and the decree of the court that the disputed territory is a part of Water street, appellants' position on the law in such case renders it unnecessary to cite any of the numerous decisions in this State, that a city holds its streets in trust for the public use and can grant no permanent right to an individual or corporation for its private use to the exclusion of the public. That the use being made and proposed to be made by appellants of this land was exclusive, cannot be doubted from the proofs. The testimony sustains the master's finding that appellants had taken possession of the land and built a number of tracks, sidings and switches "and are now using said strip of ground as a railroad yard for switching, loading, and unloading and the storing of freight cars." Such uses of a street, and the further right to construct a brick and stone depot therein and other structures are inconsistent with public enjoyment, and a deprivation of the right of the public to use the street. Of course a city has a right within proper restrictions to authorize a railroad company to lay tracks in a public street and operate cars thereon, but the right so to use the street is to be enjoyed in connection with and not to the exclusion of the public. The power to grant the right to a railroad company to use a street does not carry with it the power to authorize the company to obstruct the street so as to deprive the public and adjacent property owners of its use. *Ligare v. City of Chicago*, 139 Ill. 46. This rule we understand to be applicable to all cases where the fee of the street is in the city. *Field v. Barling*, 149 Ill. 556. In *Chicago Dock Co. v. Garrity*, 115 Ill. 155, the court say: "We recognize as unquestionable law that the use of the streets must be for the public, and that no corporation or individual can acquire an exclusive right to their use, or the use of any part of them for private purposes." In *Smith v. McDowell*, 148 Ill. 51, it was said: "The fundamental idea of a street is not only that it is public, but that it is public in all its parts, for free and unobstructed passage thereon by all persons desiring to use it." The use of the land for the purposes purported

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to be granted and authorized by the ordinance, is, in effect, to vacate that portion of the street as a street and devote it to private uses. Even if it were true as contended, that enough of the street is left unobstructed to accommodate public travel, and that the business interests desired the improvement proposed by the ordinance, or that the city authorities and numerous citizens may have thought it would be to the best business interests of the city, this could not justify or authorize the municipality in doing that which the law forbids.

We are of opinion that the uses made and proposed to be made of the street under the ordinance constitute a purpresture or public nuisance, and that equity affords a remedy by injunction at the suit of the state's attorney in behalf of the public. *Smith v. McDowell, supra*; *Doane v. Lake St. Elevated Ry. Co.*, 165 Ill. 521, and cases there cited; *Metropolitan City Ry. Co. v. Chicago*, 96 Ill. 620. And if it were true, as contended by appellants, that private individuals could not maintain the action, we are unable to see how the right to maintain this bill can be affected by the fact that some individual owners of property fronting on the ground in controversy, and others whose business is claimed to be affected by the use of the street, joined as complainants. This record does not warrant the claim of appellants that the state's attorney is a mere nominal party, lending the use of his name and official character, at the request of the attorneys for an individual.

Believing the decree of the Circuit Court to be right, it is affirmed.

Affirmed.

**The Aultman and Taylor Machinery Company v. Arthur
Fish, et al.**

Gen. No. 4,458.

1. **RETROACTIVE CONSTRUCTION**—*when rule against, not favored.* The rule that statutes are prospective and will not be construed to have retroactive operation unless the language employed in the act is so clear that it will admit of no other construction, applies only to statutes which affect some vested right or interest existing under a prior law, and does not apply to statutes which relate merely to remedies and forms of procedure.

2. **CHATTEL MORTGAGES**—*construction of statute pertaining to extensions of.* The amendment of 1903, providing for the extension of chattel mortgages only for a period of one year, applies to mortgages in force at the time it became effective, as well as to those subsequently executed.

3. **CHATTEL MORTGAGES**—*when extensions of, inoperative.* An extension of a chattel mortgage for a period longer than one year, made after the amendment of 1903, is inoperative as against third parties, even for the period of one year, notwithstanding the mortgage sought to be extended was executed prior to such amendment.

DIBELL, J., dissenting in part.

Action of replevin. Appeal from the Circuit Court of Kankakee County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed April 25, 1905.

B. F. GRAY, for appellant; EBEN B. GOWER, of counsel.

E. P. HARNEY and DONOVAN & SHIELDS, for appellees.

MR. PRESIDING JUSTICE FARMER delivered the opinion of the court.

On the 21st of October, 1901, John A. Anderson gave appellant a chattel mortgage on certain property to secure an indebtedness owing from him to appellant, which was evidenced by promissory notes maturing at different times up to October 1, 1904. On the 14th of October, 1903, appellant filed in the office of the recorder of Kankakee county, and on the 16th with the justice of the peace before whom the mortgage was acknowledged, an affidavit

for its extension, in which it was recited that there was still due and unpaid from the mortgagor to the mortgagee the sum of \$1,282.56, and that "said mortgage is hereby extended until the 13th day of October, 1905."

On the 25th day of November, 1903, Arthur Fish, one of appellees, recovered three judgments against Anderson, the mortgagor, before a justice of the peace, and caused executions to be issued thereon and levied upon a portion of the property described in the mortgage. Appellant demanded the property from F. W. Bassard, the constable who seized it under the executions and had it in his possession, but the demand was refused and appellant brought suit in replevin to recover it. The cause was tried without a jury. The court found for the defendants and plaintiff brings the case here on appeal.

At the time the mortgage from Anderson to appellant was executed, the law provided for an extension of chattel mortgages for a period of not more than two years, but the legislature subsequently amended the act, which amendment went into effect July 1, 1903, providing that an extension could not be made for more than one year, and one of the questions raised by this record is, whether the amendment affected chattel mortgages already in force when it was adopted and went into effect.

Counsel for appellant contended that the law which was in force at the time of the execution of the original mortgage enters into and forms a part of the contract existing between the parties, and that the amendment should not be held to affect it because that would be giving effect to a law that impaired the obligation of contracts. We cannot agree to this view. The amendment referred to did not affect or impair the obligation of the contract between the parties. It only affected the remedy.

At the time of the passage of the amendment and its taking effect, shortening the period for which an extension might be made, the parties had made no contract that was affected by it. The two years for which the mortgage was good had not expired and did not expire until in October

after the amendment took effect. While the law in force at the time the mortgage was executed authorized an extension for two years, no extension had been made before the law was changed by the act of 1903, shortening the period of extension to one year. If the mortgage had matured and the extension had been made before the taking effect of the act of 1903, then it would not have applied to the extension, for that would have impaired the obligation of the contract. While the rule as repeatedly announced in this State is that statutes are prospective and will not be construed to have retroactive operation unless the language employed in the act is so clear it will admit of no other construction, this rule applies only to statutes which affect some vested right or interest existing under a prior law. "It must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of the property, or the present or future enforcement of a demand, or a legal exemption from a demand made by another." *Suth. on Statutory Construction*, sec. 164. Statutes relating merely to remedies and forms of procedure are held not to belong to that class, where they do not affect the substantial rights of the parties, and such statutes apply to past contracts as well as future.

In *Fisher v. Green*, 142 Ill. 80, the Supreme Court passed upon the effect of the act of 1874 in relation to the foreclosure of trust deeds containing a power of sale, executed prior to its enactment and while the law of 1869 was in force. The act of 1869 provided that in case of the death of the grantor in any mortgage or trust deed given to secure the payment of money and containing a power of sale, the same should be foreclosed in the same manner as mortgages not containing a power of sale. The act of 1874 provided also that in case of the death of any person owning the equity of redemption, the trust deed or mortgage should be foreclosed in the same manner as mortgages not containing a power of sale. It was there held that the

power of sale was coupled with an interest and vested in the beneficiary of the trust a right, in case of default, to have the mortgaged premises sold for the satisfaction of the debt without a resort to judicial proceedings, and without redemption, and that if the act of 1874 applied, it would be divesting the parties secured, of a vested right.

In *Woods v. Soucy*, 166 Ill. 407, one of the questions involved was, whether sections 8 and 9 of the Landlord and Tenant Act of 1865, applied to leases made before the passage of that act, concerning the rights of the parties with reference to forfeiture upon a failure to comply with the terms of the lease. The act in force at the time the lease was made provided for enforcing forfeiture by demanding the precise amount of rent due on the day it became due, on the premises at some convenient hour before sunset, or by an action of ejectment when one-half year's rent was in arrears. The party seeking to forfeit the lease and obtain possession of the premises did not pursue either of these remedies, but proceeded according to sections 8 and 9 of the Landlord and Tenant Act of 1865. The Supreme Court said: "If, by applying the act to leases entered into prior to its passage, the effect would be to impair the obligation of the contract, it is evident that such a construction would render the act void; but if the act in question has relation to the remedy only, by simply changing the mere form of procedure by which the right is enforced or by giving an additional remedy, leaving the contract of the parties and their rights secured thereby unchanged, it is plain the obligation of the contract would not be impaired, and the act would apply to contracts entered into before its enactment, by providing a different or an additional remedy for their enforcement, as well as to contracts made subsequently. There can be no vested right in any particular remedy or in any special mode of administering it. *Bruce v. Schuyler*, 4 Gilm. 221; *Dobbins v. First National Bank*, 112 Ill. 553. While it is the general rule that statutes will not be so construed as to give them a retrospective operation unless it clearly appears

that such was the legislative intention, still, 'where the act merely changes the remedy or the law of procedure, all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law.' " In this case the Supreme Court refers to *Fisher v. Green*, *supra*, and distinguishes it from cases where subsequent acts of the legislature are held not to affect vested rights, but only the remedy for enforcing or protecting them. In *Van Rensselaer v. Snyder*, 13 N. Y. 299, it was held a statute abolishing distress for rent applied to leases made under a prior act providing that on default in the payment of rent the lessor might distrain, and it was there said the subsequent act did not impair the obligation of the contract, but related to the remedy only and that the legislature had the power to change the remedy. See, also, *Charles River Bridge v. Warren Bridge et al.*, 11 Peters, 420.

In *Templeton v. Horne*, 82 Ill. 491, one of the claims of title to the premises involved was based upon a master's sale under a decree establishing a mechanic's lien. The contracts between the owner and the mechanics and material men were made and proceedings instituted to establish their liens before the passage of the act of 1869, which allowed redemption from such sales, but no decree was pronounced until after that act went into effect. The decree allowed redemption according to the law in force at the time it was entered, and it was claimed it was invalid for that reason. The Supreme Court held the decree was properly entered, in accordance with the provisions of the law of 1869 and that the act did not have the effect of impairing the obligations of contracts and said: "Our understanding is, all remedies for enforcing contracts and obligations are within the control of the legislature, and any mere change that does not amount to a deprivation of all efficient remedy, is in no just sense impairing the obligation of contracts." True there are cases in which it has been held that certain changes in the Mechanics' Lien Law were not applicable to contracts existing when the change was

made, but these are cases where the law, if applied to prior contracts, would materially impair the rights of parties as they existed under the old law, and did not merely affect the remedy. *Templeton v. Horne* has been often cited but never overruled. "If a particular form of proceeding is prohibited, and another is left or is provided which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired." *Suth. on Statutory Construction*, sec. 476. *

The right to extend the chattel mortgage was created and existed only by virtue of the statute, and we think the principles announced in *Spaulding v. White*, 173 Ill. 127, *Storrs v. St. Luke's Hospital*, 180 Ill. 368, and *Sharp v. Sharp*, 213 Ill. 332, are applicable. In those cases it was held that the power of a court of equity to entertain a bill to set aside a will is derived from the statute, and that amendments to the act conferring that power, which limited the time within which a bill might be filed for that purpose to a shorter period than was provided originally, applied to a bill filed after the amendments went into effect, notwithstanding the will was probated before. In the last case above cited it was said a person had no vested right in the statute in force at the time the will was probated, and that it would have been competent for the legislature to have repealed the entire provision for contesting wills by bill in chancery.

There was no provision in the mortgage to appellant for an extension of time after the expiration of two years. Under the law as it existed at the time the mortgage was executed, it was within the discretion of the parties, by mutual consent, to extend it for a further period of two years, by complying with the requirements of the statute. We are of opinion they had no vested right in the statute then in force; that the amendment limiting the extension to one year, did not have the effect of impairing the obligation of the contract, and that it applied to and controlled extensions made after it went into effect.

Appellant contends that even if the amendment limiting

the time of extension to one year controlled, the extension though invalid for two years was good for one year. It is only by virtue of the statute that a mortgagor of chattel property may retain possession of it without rendering the mortgage invalid as to creditors. By the common law such conveyances were void as to third parties. The statute in force at the time the extension was attempted to be made, authorized an extension for the period of one year, with right in the mortgagor to retain possession of the property during that time. The parties here undertook to contract for an extension for a period of two years, which was not allowed by law. To hold it good for one year would be in effect making a new contract between the parties, one that they themselves neither made nor contemplated. We think the extension was not valid for one year, and in our opinion it was invalid to protect the property against the executions under which it was seized.

The judgment is affirmed.

Affirmed.

• Mr. Justice DIBELL, dissenting.

I concur in part of what is said above, but I am of opinion that the extension of the mortgage was valid for one year as against creditors.

Bayard Holmes v. Joseph T. McKennan.

Gen. No. 4,422.

1. SET-OFF—*burden of proof to establish.* The burden of proof to establish a set-off by a preponderance of the evidence, rests upon the defendant.

2. SET-OFF—*how amount of, to be proven.* Items constituting the alleged set-off should be proven and a witness should not be permitted to testify as to the sum total of various items unspecified which constitute the set-off relied upon.

3. RECOUPMENT—*when defendant may recover excess of, over plaintiff's claim.* A defendant is entitled to recover damages in excess of the plaintiff's claim made in assumpsit, where it appears that the subject-matter of such recoupment arose out of the same subject-matter as that upon which the plaintiff sued.

Holmes v. McKennan.

Action of assumpsit. Appeal from the Circuit Court of Rock Island County; the Hon. EMERY C. GRAVES, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed April 25, 1905.

FOSTER & BRADLEY and JOHN C. STETSON, for appellant;
PHILIP S. BROWN, of counsel.

SEARLE & MARSHALL, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

This was a suit brought by Bayard Holmes against Joseph T. McKennan in the Rock Island Circuit Court to recover for the services of plaintiff, a surgeon, in performing an operation upon defendant's wife. Defendant pleaded the general issue, and also a plea of set-off consisting of the common counts, and also various special pleas, some in set-off, and some in recoupment, all based upon alleged negligence and lack of skill in the conduct of the operation and in the subsequent care of the patient. Upon a trial defendant recovered a verdict against plaintiff for \$1,000. A motion was interposed by plaintiff for a new trial, which was denied. Judgment was rendered in favor of defendant upon the verdict and plaintiff appeals.

The proofs bearing upon plaintiff's cause of action and defendant's defense, tend to show the following state of facts: Plaintiff had his office in Chicago and made a specialty of surgery. Defendant lived at Blue Island in Cook County and his wife was ill with a cystic tumor. Her attending physician was Dr. Seim. Upon the advice of Dr. Seim plaintiff was called in consultation. He advised an operation and the removal of the tumor, and told defendant his charge for performing the operation would probably be \$250. Defendant paid him for that consultation, and plaintiff returned to Chicago. Thereafter defendant and his family decided to have the operation performed. Dr. Seim sent for plaintiff to come and perform the operation. Plaintiff took with him an assistant, Dr. Wilson. Dr. Seim was present, and also another surgeon and a nurse. Plaintiff made the incision and removed the tumor. Dr.

Seim held open the sides of the incision during the operation. Dr. Wilson handled what are called sponges, namely, strips of medicated gauze of various sizes specially prepared for that use. During the process of removing the tumor it broke, and much pus and blood was shed in the cavity. These medicated gauze sponges were used before the tumor broke in absorbing the blood from the wound. After the tumor broke the sponges were wrung in hot water and put into the cavity to absorb the pus and blood, and then removed and others used, until that result was accomplished. After the tumor had been removed, the blood vessels opening into the cavity tied up, the flow of blood stopped and the cavity cleansed, a large piece of medicated gauze, or a sponge, was pressed into the cavity with its outer edges extending outside the wound. This was called a handkerchief. Other pieces of gauze were then packed inside the handkerchief until it was full. Then the wound was in part closed. The purpose of the handkerchief was to absorb further discharges of blood and to maintain drainage. The proof shows that after the lapse of a certain period of time it was the duty of the attending physician gradually to remove the contents of the handkerchief and then the handkerchief itself, and then to insert other pieces of gauze to establish secondary drainage. After the operation was completed plaintiff returned to Chicago and never afterwards saw the patient, except that some little time thereafter being in Blue Island in attendance upon another patient, he called to see how Mrs. McKennan was getting along. Dr. Seim, who had been the physician in charge prior to the operation, continued as physician in charge thereafter. The patient measurably recovered, but was not fully restored to health. Plaintiff sent his bill to defendant for \$225, for the operation, and received numerous letters from defendant in which he promised to pay. Defendant and his wife removed to Rock Island. Before his removal Dr. Seim gave directions for the further treatment of Mrs. McKennan, which were followed for some time. She did not fully regain her

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health, and a physician in Rock Island was called. He found her suffering from a fistula opening in the abdominal wall, discharging pus. He caused her to be removed to a hospital in Rock Island, where he and another surgeon dilated the opening, and while they were going through that process a piece of gauze worked out through the opening, and not very long thereafter the wound healed and the patient slowly improved.

It is the theory of defendant that this was one of the sponges placed in the wound by plaintiff to absorb the pus and blood, and negligently and unskillfully left there. By a special verdict the jury found that plaintiff or his assistants placed that gauze in the wound. If this special verdict means that plaintiff or his assistants, while performing the operation, left that piece of gauze in the wound, we are of opinion such finding was not warranted by the proof. Not only did plaintiff testify that he removed all the gauze he placed in the wound up to the time he inserted the handkerchief, but Dr. Wilson testified that it was his special and only business to handle the sponges, hand them to plaintiff, and keep track of them, and that he personally observed and knows that every sponge inserted before the insertion of the handkerchief was removed; and also that no piece of gauze of the dimensions stated by the Rock Island physicians as removed from the fistula opening, in the hospital at Rock Island, was used at the time of the operation in Blue Island. Moreover, the insertion of this gauze after the tumor broke was before the tumor was removed, and it is hardly conceivable that in the subsequent process of entirely removing the tumor and cleansing the cavity anything could have been left therein. No witness testified that any gauze was then left in the cavity. Dr. Seim remained in subsequent control of the patient, and the proof shows that a certain number of days after the operation it would be his duty to remove the contents of the handkerchief and the handkerchief itself, and then to insert other pieces of gauze to establish secondary drainage. Dr. Seim was not called, and there is no proof what

he did in that regard. It was for defendant to establish his claim of set-off by a preponderance of the evidence, and we are of opinion that the preponderance of the evidence in this record is that the piece of gauze in question was not left in the cavity at the time of the operation. If the special verdict means that Dr. Seim placed this gauze in the wound when establishing secondary drainage a week or two thereafter, and that he is to be treated as plaintiff's assistant at that time, then we are of opinion that that conclusion is not warranted, for the reasons hereinafter stated.

The case was tried on behalf of defendant, and instructions were requested by defendant and given, on the theory that in the absence of any express contract to the contrary plaintiff was bound not only to perform the operation in a skillful manner, but also thereafter to attend the patient until she was restored to health or he was sooner discharged; and that if the sponge found in the abdominal cavity during the treatment at Rock Island was inserted by Dr. Seim after plaintiff left the patient, still plaintiff would be responsible therefor in the absence of an express contract that he was not to continue to attend the patient. In our judgment this theory is not warranted by the facts of this case. Dr. Seim was the physician in regular charge of the patient before plaintiff was called in consultation, and remained in charge of the patient after plaintiff had performed the operation and departed. It is entirely clear to us that plaintiff was first called merely to advise what should be done and was next called to perform the operation which he advised, and that neither defendant nor plaintiff expected that he would thereafter continue in the treatment of the case, and that he was not employed for any such purpose.

Defendant testified that he should judge he had expended \$1,200 or \$1,500 in the subsequent treatment of his wife. The court denied a motion by plaintiff to exclude this answer, and plaintiff excepted. We hold this ruling was erroneous. Defendant should have been required to state

the various items of expense to which he had been put, either precisely or as nearly as he could remember them. Permitting him to state a lump sum in this way gave him an opportunity to include items for which plaintiff could not be responsible, and deprived plaintiff of the opportunity of objecting to such items of expense.

The question is raised whether under the state of facts claimed by defendant he had a right to show his damages, if any, under pleas of set-off and recover an affirmative judgment if they exceeded the amount of plaintiff's bill, or whether he could only use the testimony by way of recoupment to defeat in whole or in part plaintiff's claim for compensation. *Edwards v. Todd*, 1 Scam. 462, was assumpsit to recover a sum agreed to be paid for the transportation of certain merchandise. Defendants gave notice, under the general issue, that they would prove, by way of set-off, that part of the goods agreed to be transported, exceeding in value the whole of plaintiff's claim, was lost and destroyed through the negligence and carelessness of plaintiff. The court said the gist of the right to make a set-off arose from a failure of plaintiff to perform that part of his contract which required him to deliver the lost goods as well as those not lost; that the claim did not partake of that uncertain character which marks cases of unliquidated damages sought to be recovered in actions purely *ex delicto*, and that damages arising purely *ex delicto* were not intended to be embraced within the words, "claims or demands" in the statute relating to set-off; but that those words are to be confined to such damages as arise from contracts or agreements expressed or implied. *Nichols v. Ruckells*, 3 Scam. 298, was a suit on an account. One charge by plaintiff was for the rent of a mill under a written contract, wherein plaintiff agreed to do certain things. One item of defendant's set-off, greatly exceeding plaintiff's claim, was for a certain loss occasioned to defendant by failure of plaintiff to keep said written contract. It was objected that evidence of this set-off was inadmissible, because it was in the nature of unliquidated damages. The objection

was overruled, and defendant had a judgment for \$61.14. It was held that the words, "claims or demands" in the statute relating to set-off, embraced all cases arising out of contracts express or implied, and that this set-off arose out of the contract embraced in plaintiff's claim, and the evidence was properly admitted. *Kaskaskia Bridge Co. v. Shannon*, 1 Gilm. 15, was assumpsit upon certain drafts or orders. Defendants under a plea of non-assumpsit, gave notice that they would show, by way of set-off, that said drafts were given for the building of a bridge by plaintiff, and that plaintiff so unskillfully and defectively performed the work that the bridge was wholly valueless and was lost to defendants, and that thereby defendants were damaged in a sum far in excess of the amount of the orders. The court refused to admit proof of the matter stated in the notice. Plaintiff had judgment, and defendants appealed. It was held that the matter contained in the notice of set-off, being a claim for unliquidated damages arising *ex contractu*, constituted a good claim of set-off under the statute, and that the court erred in refusing to admit the testimony. *Hawks v. Lands*, 3 Gilm. 227, was assumpsit. A demurrer was sustained to a plea of set-off which alleged a breach of a certain covenant in a deed given by plaintiff to defendant. It was held this demurrer was properly sustained, because unliquidated damages arising out of contracts or torts totally disconnected with the subject-matter of plaintiff's claim, are not such claims or demands as constitute a subject-matter of set-off under the statute; and that the cases of *Edwards v. Todd*, *supra*, and *Nichols v. Ruckells*, *supra*, had only gone the length of deciding that damages arising out of the contract on which the suit is brought may be set-off, and that that rule could not be extended so as to include unliquidated damages arising out of contracts totally disconnected with the subject-matter of plaintiff's claim. In *Sargeant v. Kellogg*, 5 Gilm. 273, it was held that unliquidated damages arising out of contracts, express or implied, may be set-off in actions *ex contractu*, but not where the claim for unliquidated damages is totally

unconnected with plaintiff's cause of action. *Sanger v. Fincher*, 27 Ill. 346, was a bill in equity, but the subject of set-off was discussed. It was held that the statute did not limit the right of set-off to liquidated claims or demands, and that the construction placed upon the act is that where the damages are unliquidated, the claim or demand should relate to the transaction out of which the controversy has grown, and that unliquidated damages arising out of the same transaction may be set-off under the statute. In *Springdale Cemetery Association v. Smith*, 32 Ill. 252, a suit to recover a balance claimed to be due under a contract to erect a cemetery vault, defendants asked the court to instruct the jury that if they believed from the evidence that defendants had suffered damage from the default or want of care and skill of the plaintiffs in performing such contract, and that such damage exceeded the amount plaintiffs would otherwise be entitled to recover, the jury should find for defendants the amount of the excess. It was held the trial court erred in refusing that instruction, although the question here involved was not discussed, but it was taken for granted in the opinion that in such case defendants would be entitled to recover an affirmative judgment. In *DeForrest v. Oder*, 42 Ill. 500, it was held that a plea of set-off was defective which offered to set off unliquidated damages growing out of a breach of a contract, without alleging that they grew out of and were a part of the contract sued upon. It was there said that such damages arising out of contracts or torts not connected with the subject-matter of the suit, do not constitute a proper set-off under our statute, and that there was no averment in the plea that the matter there set up by defendant was connected with the matter upon which plaintiff brought suit. In *Clause v. Bullock Printing Press Co.*, 118 Ill. 612, it was held that unliquidated damages arising out of a contract unconnected with the subject-matter of plaintiff's suit were not the subject of set-off. In *Higbie v. Rust*, 211 Ill. 333, an action of assumpsit, defendant, under the general issue, gave notice of set-off. The court excluded evi-

clence of a set-off, and plaintiff recovered. It was there said of defendant: "The latter seeks to offset unliquidated damages which he charges resulted from the violation of an entirely distinct and independent contract. Such unliquidated damages could not be offset, as they grew out of an alleged breach of a contract other than those sued upon, and in nowise connected therewith." In *Hartshorn v. Kinsman*, 16 Ill. App. 555, this court held that unliquidated damages which do not arise out of the contract or cause of action sued upon, are not a proper subject of set-off; that in order that unliquidated damages be set off, they must arise out of the transaction upon which the suit was brought. In *Weaver v. Penny*, 17 Ill. App. 628, this court applied the same rule. That was assumpsit on a promissory note, given for the price of sheep sold by plaintiff to defendant. Defendant claimed that the sheep were warranted sound and free from disease, and that they were in fact diseased, and many of them died, and the disease was communicated to cattle of defendant, and resulted in the death of several of the cattle. Defendant claimed damages for breach of the warranty, and sought to recoup or set off the damages. There was a stipulation that all evidence proper to go to the jury under any proper special plea might be given under the general issue. The trial court held in instructions that the defendant could not recover an affirmative judgment against plaintiff for damages occasioned by a breach of the contract of warranty, but could only recoup to an amount not exceeding plaintiff's claim for principal and interest upon the note. It was held that these rulings were erroneous, but the judgment for plaintiff was affirmed for other reasons. In *South Chicago City Railway Company v. Workman*, 64 Ill. App. 383, it was held that in an action for wages, defendant may set off damages occasioned by the negligence of plaintiff in his employment, and that defendant may have judgment for any balance due; and that the fact that the damages were unliquidated is no obstacle to setting them off, when they grow out of the same subject-matter as the demand against which they are offered. The

trial court refused a proposition of law that defendant could set off against the sums it owed plaintiff any sums due from plaintiff to defendant because of damage to its property caused by plaintiff's negligence in the performance of his work. It was held the court erred in refusing this proposition. In *Scudder-Gale Grocer Co. v. Russell*, 65 Ill. App. 231, plaintiff sold defendant coffee and fruit jars, the coffee to be delivered immediately, and the fruit jars within one month. Plaintiff sued for the price of the coffee, and defendants sought to set off the damages they had sustained by reason of the non-delivery of the fruit jars, and defendants recovered a judgment for \$25.05. The court said: "Inasmuch as these damages, though unliquidated, were occasioned by a breach of the contract sued upon, the right of set-off, and therefore of recovery by the appellees of the excess due him, seems to be unquestionable."

In some of the earlier of the foregoing cases, there is language used which does not at all times maintain clearly the distinction between the recoupment and set-off. There are some other cases in this State where the distinction is not clearly preserved, or where the principles laid down in the foregoing cases do not seem to be closely followed. Nevertheless we conclude that the rule stated in the authorities above cited is the law of this State. The amended third and fourth pleas of set-off in this case allege that the defendant employed plaintiff as a physician and surgeon to treat his wife, and that plaintiff entered upon the treatment and performed the operation so negligently and unskillfully, that by and through his want of skill and care, the sickness and malady of defendant's wife was greatly aggravated, and she became greatly disordered and weakened in body, and so remained for a long time, and that defendant was thereby obliged to incur a great indebtedness to other physicians and surgeons, nurses and servants, in her care, causing him damage in the sum of \$5,000, which he offered to set off against plaintiff's claim; and he averred that the several causes of action upon which plaintiff has declared, are claimed by plaintiff for, upon and

out of the same subject-matter set forth in the plea; and defendant therein prayed judgment for the balance. We conclude that under said amended third and fourth pleas, defendant was entitled to recover unliquidated damages growing out of the same subject-matter and contract upon which plaintiff brought suit, if the proof sustained said pleas. Defendant could not recover under the amended second plea, which was the common counts, because they did not show that the matter sought to be set off arose out of the same subject-matter as that upon which plaintiff sued.

But for the other reasons stated, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

The County of Carroll v. George S. Durham.

Gen. No. 4,435.

1. PAROL EVIDENCE—*when competent to aid return upon venire.* In an action by a special bailiff to recover fees for serving a venire, it is competent for him to aid his return, where uncertain, by parol evidence.

2. RETURN UPON VENIRE—*when insufficiency of, cannot be urged.* The insufficiency of the return upon a venire cannot be questioned in an action brought to recover fees for the service of such venire, where the defendant has improperly caused parol evidence to aid such return to be excluded.

3. CONSTABLE—*power of Circuit Court to require service of.* There is now no law in force in this State which empowers the Circuit Court to compel a constable to serve its writs and to attend upon its juries; nor is there any law which imposes upon a constable any such duty.

4. SPECIAL VENIRE—*compensation to which constable serving, entitled.* A constable appointed a special bailiff to serve a venire is entitled to recover by way of compensation therefor the fees prescribed by statute to be paid to a sheriff serving such a writ. A constable likewise performing the services of a special bailiff in attending upon a court, is entitled to the same compensation as that provided for sheriffs when performing such functions. Nor is the payment of such compensation in any wise contingent, as in the case of sheriffs.

VICKERS, J., dissenting.

County of Carroll v. Durham.

Action of assumpsit. Appeal from the Circuit Court of Carroll County; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed April 25, 1905.

FRANKLIN J. STRANSKY, for appellant.

RALPH E. EATON, for appellee.

MR. JUSTICE DIBELI delivered the opinion of the court.

During the impanelment of a jury in the case of The People against Estelle and others in the Circuit Court of Carroll County, the regular panel of the petit jury was exhausted by challenges. The court ordered a venire to issue for fifty persons having the qualifications of jurors, to fill the panel for that trial. The defendants objected to the service of said writ by the sheriff. The court then appointed George S. Durham a special bailiff to serve said writ, and he served it, and afterward brought this suit against the county of Carroll to recover the fees and mileage to which he claimed to be by law entitled for that service. He recovered a verdict and a judgment for \$50.30, from which the county prosecutes this appeal.

Section 19 of the act of March 29, 1872, relating to Fees and Salaries (being chapter 53 of the Revised Statutes of 1874), is headed, "Sheriff's Fees," and contains the following: "For summoning each juror in counties of first class, fifty cents; second class, thirty cents; third class, twenty cents; with five cents mileage each way in all counties." Carroll county is in the first class. Section 13 of chapter 78 of the Revised Statutes relating to jurors, enacts that when, by reason of challenge in the selection of a jury for the trial of any cause the regular panel shall be exhausted, "the court may direct the sheriff to summon a sufficient number of persons having the qualifications of jurors to fill the panel for the pending trial; but, upon objection by either party to the cause to the sheriff summoning a sufficient number of persons to fill the panel, the court shall appoint a special bailiff to summon such persons; provided, the same person shall not be appointed special bailiff more

than once at any term of court." Plaintiff introduced the writ directed to him, and his return thereon, showing service upon fifty persons, for which service he charged upon the writ \$25, and also showing rather blindly that he had traveled 506 miles in serving the writ, for which he charged upon the writ \$25.30 for mileage, making a total of \$50.30. Plaintiff was a witness in his own behalf, and was asked by his counsel what he did in reference to serving that writ. Defendant objected upon the ground that the return should show how he executed the writ, and that it could not be explained by parol. The court held with defendant, and plaintiff's counsel then elicited from the witness that his return on the writ was true and correct as to the number of miles and as to the names and numbers of persons served, and that he did the work. While we are of opinion that in this suit the return was not conclusive and that the lack of definiteness as to the number of miles traveled by plaintiff in serving the writ should have been aided by parol proof on that subject, yet as defendant kept out such proof by its objection, we think it should be held that the return and the oral proof which was admitted sufficiently shows that he traveled 506 miles in serving the writ. *Hahl v. Brooks*, 213 Ill. 134. The court instructed the jury that if plaintiff was so appointed special bailiff to summon persons to serve as jurors in said court, and under authority of such appointment did summon persons to act as jurors, then he was entitled to recover from defendant fifty cents for each person served, together with five cents mileage each way traveled in serving each person so summoned. The verdict followed the proof and said instruction, and if such special bailiff is entitled to the fees prescribed by the statute for the performance of like services by a sheriff, then the verdict and judgment should stand.

Defendant showed by plaintiff on cross-examination that at the time he was so appointed special bailiff he was a constable of the town of Woodland in said county, but the court, on motion of plaintiff, excluded that answer. Defendant sought to prove that fact affirmatively in making

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its case, but the court sustained an objection thereto. Section 41 of said Act of 1872 relating to "Fees and Salaries" reads, in part, as follows: "The fees of constables in counties of the first and second class, for any service to be rendered by them, shall be as follows: * * * For each day's attendance in the Circuit Court when required, to be paid out of the county treasury, two dollars and fifty cents." Plaintiff performed the service in question in two days. Defendant claims that plaintiff was a constable attending in the Circuit Court, and that under the statute just quoted he was entitled to \$2.50 per day for that service, and no more; and after the suit was begun, it tendered him \$7.05, the total costs then due in the case, and \$5 as his compensation for the two days' time spent in serving said venire, and \$10 in addition, and kept said tender good by bringing the money into court; and sought to plead said tender, though the sufficiency of the pleading is questioned. The first question is, therefore, whether, if defendant had been permitted to prove that plaintiff was a constable at the time he was selected to perform those services, it would have followed that it was his official duty to execute the writ, and whether in such case the compensation fixed therefor by law was \$2.50 per day. Section 55 of the Act of 1827 concerning "Justices of the Peace and Constables" (Revised Laws of 1833, page 400), made it the duty of the clerk of the County Commissioners Court to notify the sheriff whenever a person was appointed and qualified as constable, and required the sheriff to keep a list of the constables within his county and to summon four constables (if necessary) of his county to attend at each term of the Circuit Court, taking them in rotation; and required constables so summoned to attend and act under the sheriff as his deputies during the sitting of such court, under penalty of being fined for contempt of court for failing to attend or refusing to act. The Act of 1827 in relation to fees (Revised Laws of 1833, p. 294), gave constables a *per diem* to be paid out of the county treasury for "each day's attendance on the Circuit Court when required." These

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acts were repealed by chapter 90 of the Revised Statutes of 1845. The same provision substantially, requiring the sheriff to summon constables to attend each term, and requiring constables so summoned to attend, was re-enacted in section 87 of chapter 59, entitled "Justices of the Peace and Constables," in the Revised Statutes of 1845 (Revised Statutes of 1845, p. 329). The same provision for a *per diem* to be paid constables out of the county treasury for "each day's attendance on the Circuit Court when required," was embodied in section 19 of chapter 41, entitled, "Fees and Salaries," of the Revised Statutes of 1845 (Revised Statutes of 1845, p. 247), and in section 41 of the Act of March 29, 1872, entitled, "Fees and Salaries" (now known as chapter 53 of the Revised Statutes of 1874), the compensation having been increased to \$2.50 per day. The statutory provision which had been in force from 1827 requiring constables, when summoned by the sheriff, to attend the Circuit Court and act under the sheriff as his deputies during the sitting of the court, was still in force when the provision giving constables fees for attendance on the Circuit Court, when required, was re-enacted in 1872; but the law requiring such attendance was repealed in 1874, and was not re-enacted. The fee remained, but there was no longer a statute under which constables could be required to perform the service. Said Act of 1872, as embodied in chapter 53 of the Revised Statutes of 1874, is entitled, "An Act concerning Fees and Salaries and to classify the several counties of this state with reference thereto." The provision in the Act of 1872, for paying constables for each day's attendance in the Circuit Court when required, was for paying them for a service which a law then in force made it their duty to perform, but it did not profess to confer upon any court or officer power to require the attendance of constables in the Circuit Court, and if it did so provide that would not be within the title to that act. There is no statute in force in this State since 1874, so far as we are advised, by which constables can be required to serve in the Circuit Court.

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Section 15 of division 13 of the Criminal Code in force since 1874, provides that when the jury retires to consider their verdict in any criminal case a constable or other officer shall be sworn to attend the jury and keep them together, and return them into court when they have agreed upon their verdict; but that statute contains nothing which compels a constable to render that service. We conclude, therefore, that if the court had permitted proof that plaintiff was a constable of Carroll county, that would not have shown that the Circuit Court had power to compel him to serve the writ in question, or that the serving of said writ was a duty imposed upon him by law by virtue of his office of constable. The expression in *McWilliams v. Richland County*, 16 Ill. App. 333 (on p. 337), that it is the plain intendment of section 41 of chapter 53 of the Revised Statutes, that constables may be required to attend on the Circuit Court, seems to have ignored the fact that when that act was adopted there was another law in force requiring constables to attend upon the sessions of the Circuit Court when required, and that the act imposing that duty upon constables was afterward repealed. When said section 41 was enacted in 1872, the legislature could not have intended thereby to require constables to attend on the Circuit Court, for there was another law to that express effect then in force. The repeal in 1874 of the act requiring such service of constables could not have the effect to enlarge the meaning of said section 41 of the act of 1872. The simple fact is, that after the repeal of 1874, constables no longer owed that duty, but the fee formerly provided when the duty existed was left standing in the fee act unrepealed. It is to be noted in this connection that the order of court appointing plaintiff special bailiff to serve this writ did not describe or designate him as constable. The order did not profess to appoint him such special bailiff because of his official character as constable. The court did not profess to be acting under any supposed authority to compel a constable to render that service.

We are also of opinion that this was not such a service as was contemplated by the provision in the act concerning fees and salaries already quoted, giving a constable \$2.50 per day for attendance in the Circuit Court. That refers to attendance upon the sessions of court, performing the duties usually required of a tipstaff or court bailiff, such as waiting upon the court when in session, preserving order therein, attending the wants of juries and taking charge of juries when they are not permitted to separate at intermissions during a trial, and also when they retire to consider their verdict. This special bailiff was not required to attend the sessions of the court or to give "attendance in the Circuit Court," or to perform any of those duties which ordinarily devolve upon the bailiff of a court. The service of this writ required plaintiff to travel over the county, to exercise judgment in selecting men who were qualified for jury service, and undoubtedly to travel to the remote parts of the county in order to secure jurors less likely to be disqualified from serving in the pending trial. The panel had been exhausted and the court was waiting, and the service was required to be promptly performed. The officer had to furnish his own conveyance and meet his own expenses during that journey over the county. It is manifest that a *per diem* of \$2.50 to a constable attending upon a session of court would not be adequate compensation for the service performed by this special bailiff in serving this writ. Defendant recognized this when it tendered him \$10 in addition to the *per diem*. We are of opinion this was not the service for which the statute intended a constable attending a Circuit Court should receive \$2.50 per day.

The statutes of this State apparently do not create the office of bailiff nor directly fix the compensation therefor. Section 3 of the Act of March 22, 1819, regulating the practice in the Supreme and Circuit Courts, recognized the existence of the ancient common law office of bailiff when it provided that no counselor or attorney at law, sheriff, under-sheriff, bailiff or other person concerned in the execu-

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tion of process should be permitted to be special bail in any action. By section 1 of chapter 14 of the Revised Statutes of 1845, and by section 5 of chapter 16 of the Revised Statutes of 1874, that provision has been continued in force till the present time. Section 1 of the Act of February 16, 1857, authorized the judge of each judicial circuit to empower the sheriff of each county composing said circuit to employ as many additional bailiffs above the number provided by law as might, in the discretion of such judge, be necessary for the dispatch and disposal of all causes and actions in said court, for which said bailiffs were to be paid \$2 per day out of the county treasury. This act was repealed by the general repealing statute of 1874, and does not seem to have been re-enacted. Section 110 of the County Court Act of 1874 enacts, that if the sheriff, coroner or bailiff, is interested in a pending jury case, or if any interested party objects to any sheriff, coroner or bailiff selecting the jury, the court, if it thinks such objection reasonable, shall appoint an impartial bailiff to summon the jury. Section 7 of the Probate Court Act of 1881 authorizes the delivery of a jury venire to the sheriff or coroner, or to any bailiff of the court, who shall summon the jury from the body of the county. These acts do not directly provide that bailiffs shall be appointed in said County and Probate Courts, nor do they say who shall appoint them, nor how much nor by whom they shall be paid. The act establishing the Commission of Claims, and the later act establishing the Court of Claims, each provides for a bailiff to attend such body, and that he be paid \$3 per day. So far as our attention has been called, there is no other statute now in force expressly naming bailiffs as officers of court except the one here drawn in question authorizing the court to appoint a special bailiff to summon persons into court to fill a depleted jury panel when either party objects to the sheriff serving such writ. The courts, however, have treated the ancient common law office of bailiff as still in existence in this State, and have recognized the power of the Circuit Court to have bailiffs to serve at the term, either by appointment

by the sheriff or by the court itself. The case of *People v. Foster*, 133 Ill. 496 (pp. 512, 513), says that the practice, at least, is for the trial judge to certify to the number of bailiffs required, and to the fact of their attendance, and for the sheriff to appoint "such bailiffs for attendance upon the courts as may be necessary and permitted. Because of the requirement of the law that the sheriff shall attend the several courts of his county, which is directory only, it has been deemed advisable that this ancient office of bailiff be perpetuated, that the court in counties having a number of tribunals may have at its bidding a sworn officer to enforce its orders affecting the present business of the court." *Guyman v. Burlingame*, 36 Ill. 201; *McCann v. People*, 83 Ill. 103; *McWilliams v. Richland County*, 16 Ill. App. 333. Section 19 of chapter 125 of the Revised Statutes of 1874, relating to sheriffs, enacts (as did the prior statutes in substance) that "each sheriff shall in person or by deputy attend upon all courts of record held in his county when in session and obey the lawful orders and directions of the court." Similar provisions are found in the several statutes relating to the different courts. The section fixing the fees of sheriffs, from which we have already quoted, further provides, "for attending the Circuit and County Courts, to be allowed, and paid out of the county treasury, \$3 per day, and \$2 per day when attending County Court sitting for probate business, at the request of the judge, the time to be certified by the judge." That these duties may be performed by bailiffs is recognized in *County of LaSalle v. Milligan*, 143 Ill. 321, 348. It is there said of such bailiffs, "while they are the sheriff's under-officers, they are not deputy sheriffs, and the fees of bailiffs in no sense belong to or are a part of the earnings of the office of sheriff." It will be observed that the statutes from which we have quoted did not require or even authorize constables to attend the sessions of any court except the Circuit Court, while the decisions and statutes above cited recognize the authority of the County and Probate Courts to have bailiffs in attendance. Where a person not a constable is appointed

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a bailiff by the sheriff and attends the sessions of any court, we are not aware of any express provision of the statute for his compensation. Manifestly it was not intended that bailiffs should render gratuitous service. In *County of LaSalle v. Milligan, supra*, it was said (on page 348) that bailiffs are entitled to \$2.50 per day. This seems not to be based upon any statute to which our attention has been called, unless the bailiffs there referred to were in fact constables, attending the sessions of the Circuit Court, whose fees for that service are fixed at \$2.50 per day by the statute already referred to. Such constables are not, however, called bailiffs in the statutes. That provision regarding the *per diem* of constables when they attend the sessions of the court, does not purport to fix the compensation of persons, not constables, serving as bailiffs in the various courts. Bailiffs are not required to serve without pay. No statute expressly fixes a fee for them. We, therefore, are of opinion that regular bailiffs (not constables attending sessions of the Circuit Court) are entitled to the same compensation the law provides for the sheriff when he attends upon court in person or by deputy.

But not only was the duty required of the plaintiff in this case entirely different from that imposed upon the ordinary court bailiff to attend the sessions of court, but the special bailiff which the Jury Act requires the court to appoint to serve a special jury venire when either party objects to the service thereof by the sheriff, does not mean the regular bailiff who attends the sessions of the court, whether constable or not. That act does not provide that upon objection to the service by the sheriff the duty may be performed by any of the regular bailiffs in attendance upon the court. The reason is obvious. The sheriff appoints or selects the persons who are to act as bailiffs. *People v. Foster, supra*. The regular panel of jurors is drawn from the box by law, and is not selected by the sheriff. If either party to a pending suit objects to the sheriff serving a special venire to fill a depleted panel for the trial of that case, the intention of the statute is that no bailiff selected by the sheriff shall summon the tales-

men, but that the court shall select some one else to perform that duty. If the person selected chance to be a constable, we have already seen that that fact does not make it his official duty to serve the writ. There is no express provision of the statute for any compensation to a person serving such special venire, when objection has been made to the service by the sheriff, which of course includes an objection to service by his deputies and by bailiffs selected by him. It is the theory of the defendant here that if the statute provides no compensation, then no compensation is required to be paid, and the service must be gratuitous. It is undoubtedly the law that where a regularly appointed officer having certain compensation provided by law has cast upon him by law further duties for which no compensation is provided, he takes the office with that burden and must perform that service without further compensation than that otherwise attached to the office. But this principle does not fairly apply to a person appointed to perform a duty which he is not by law compelled to perform. It is essential that the court shall have the power to obtain a jury. As said in *County of LaSalle v. Milligan, supra*, on page 342: "The conclusion seems irresistible that the legislature intended to make the fees for summoning jurors a county charge—and this, it is believed, has been the uniform construction of this statute by courts and by county authorities ever since it became the law, July 1, 1872." If, now, it be held that because there is no law fixing specifically a compensation for the special bailiff called upon to serve such a writ as this, therefore the person serving it can receive no compensation, the hands of the court would be practically tied, and its ability to complete the jury for the pending trial in such case would be very much abridged, if not entirely destroyed in many cases. Such a special bailiff is appointed to take the place of the sheriff, and is authorized to perform a service which the law casts upon the sheriff and his deputies, and for which the law provides a compensation, which service no one but the sheriff and his deputies have legal authority to perform, except in certain special cases, one of which is where a party

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to the suit objects to the sheriff serving the writ. In our judgment the only construction that will give the court adequate power to perform its functions and complete the impaneling of such a jury, is to hold that the special officer appointed by the court to perform the duties of the sheriff in such case, should receive the same fees and mileage which the law gives to the sheriff for summoning such a jury.

But it is said that these fees are not given to the sheriff absolutely, but that they only form the fund out of which the salary fixed for him by the county board and the expenses of his office may be paid, the surplus going to the county, and that for aught we can know in the present case, the other earnings of the sheriff's office had been sufficient to pay the salary of the sheriff and the expenses of his office, so that if the sheriff had served this writ these fees might have been turned into the county treasury, instead of being retained by that officer. This in our judgment furnishes no sufficient objection to paying the special officer the sum fixed by law for the service he has performed. He was not the sheriff nor was he selected or controlled by the sheriff, nor was he required to account for his fees to the county, but he performed under those special circumstances services for which the law had prescribed a certain *per diem* and mileage as the proper and fixed compensation. The statute had only named the sheriff as the officer to receive that compensation for the service, because he was the officer upon whom alone, or upon his deputies, the duty of serving the venire regularly devolved. But we think it a reasonable construction to hold that if, under special circumstances he and his deputies became incompetent to act, the person specially appointed would be entitled to the compensation the statute had provided for that service when performed by the regular officer. The provision requiring the sheriff to pay the county what, if anything, his office earns above his salary, etc., does not make the statute fixing the fees of the sheriff, a revenue act. Revenue for the county is not its purpose. It is fair to presume the legislature considered the fees it

fixed for the various services required by public officers a reasonable compensation therefor. If it should be held that this special bailiff was only entitled to just compensation, no fairer way of determining it could be found than to adopt that which the legislature had fixed for the same service when performed by the officer to whom that duty was ordinarily assigned. There is no statute fixing the fees of a special master in chancery, but we presume no one would doubt that he would be entitled to the same compensation fixed by law for the regular master. Suppose the sheriff and the coroner should be joint defendants in an action at law, and it should become necessary to appoint an elisor to serve the summons, or a special bailiff to fill a depleted panel of jurors for the trial of that case? If such elisor or special bailiff can receive no compensation because the statute does not expressly fix fees or mileage for the performance of those duties by officers specially appointed, then the court would be powerless to cause the summons to be served or the action to be tried unless some one could be found to act gratuitously. We think such a view of the law should be taken as would enable a court to discharge its usual functions in such a case, which might easily arise. It is within the reason, spirit and object of the statute governing fees, that any one who acts in place of the sheriff under special circumstances arising by operation of law (such as a special bailiff, acting in place of the sheriff in a case where the law gives a party to a suit a right to prevent the sheriff from acting), should receive the fees and mileage which the law has attached to that service when performed by the sheriff. That which is within the reason and spirit of the statute may justly be held to be within the statute.

In our judgment the plaintiff properly recovered the exact sum which the statute would have allowed to the sheriff for fees and mileage for serving this writ. It is, therefore, unnecessary to determine whether the tender of a less sum was properly pleaded.

The judgment is affirmed.

Affirmed.

Mr. Justice VICKERS, dissenting.

Brasher v. McCaskrin.

J. L. Brasher, et al., v. H. M. McCaskrin.**Gen. No. 4,522.**

1. *CONSIDERATION—what sufficient, to support agreement to release.* Compliance with a condition named by a lessor to a lessee, is a sufficient consideration to support an agreement by the former to release the latter from the obligations of his contract. *Held*, in this case, proof of compliance was not made.

Action of assumpsit. Appeal from the Circuit Court of Rock Island County: the Hon. WILLIAM H. GEST, Judge, presiding. Heard in this court at the April term, 1905. Affirmed. Opinion filed April 25, 1905.

STURGEON, STELOK & STURGEON, for appellants.

H. M. McCASKRIN, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

H. M. McCaskrin recovered against J. L. and Mary O. Brasher, both before a justice and in the Circuit Court on appeal, a judgment for \$16 for the rent of certain premises in the city of Rock Island, due February 1, 1903, for that month, under a written lease from plaintiff to defendants. Defendants prosecute this further appeal. The proofs make an undisputed case for plaintiff unless defendants proved that after the lease was executed plaintiff released them therefrom for a valuable consideration, or said that to them which created an estoppel. J. L. Brasher testified that after the lease was executed plaintiff told him that if he could get a house with a barn suitable for his horse plaintiff would release him from the contract, and that the witness afterward leased another house. Defendants do not prove that they or J. L. Brasher leased a house with a barn suitable for a horse, or with a barn of any kind (in which respect appellants' abstract and briefs are misleading), nor did they prove when this conversation was had nor when the witness leased the other house. This may all have been after the month of February, for the suit was not begun till September. If we concede that if defendants had complied with the conditions specified, namely,

that they get a house with a barn suitable for their horse, that act by them would furnish a consideration sufficient to support a promise by plaintiff to release them from their contract with him, still they did not show that they complied with that condition. The court therefore properly instructed the jury to find for plaintiff.

The judgment is affirmed.

Affirmed.

County of Henry, et al., v. Charles F. Stevens.

Gen. No. 4,458.

1. INJUNCTION—*when bill does not justify issuance of.* A bill seeking an injunction to restrain a municipality from performing a contract as *ultra vires*, is insufficient where it fails to show that any act or acts have been performed under such contract or that any liability on account thereof has accrued or is to accrue against the municipality.

2. BILL OF COMPLAINT—*when answer does not aid.* An answer which in terms supplies the omissions of a bill of complaint does not so aid the same, if the answer is unresponsive, as to authorize the granting of an injunction.

3. CONTRACTS—*power of county board to make.* In general, a county board has power to make all contracts and to do all other acts necessary or expedient to the management and control of county property and concerns.

4. CONTRACT—*when not ultra vires.* A contract made by a county board with a private individual, by which the latter undertakes to search for property omitted from the assessment for a compensation to be paid, is not *ultra vires*.

Injunctive proceeding. Appeal from the Circuit Court of Henry County; the Hon. EMERY C. GRAVES, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed April 25, 1905.

CHARLES E. STURTZ, State's Attorney, and SEARLE & MARSHALL, for appellants.

N. F. ANDERSON and HENRY WATERMAN, for appellee.

MR. JUSTICE VICKERS delivered the opinion of the court. Charles F. Stevens, a citizen and taxpayer of Henry

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County, filed a bill to enjoin the county clerk, county treasurer, George H. Manlove and the county of Henry from carrying out a contract entered into between the board of supervisors, on behalf of the county, and George H. Manlove. The contract was one employing Manlove to make careful and diligent search for omitted and unassessed personal property and to report the same to the proper officials for assessment, if any should be found, and also to search for moneys due said county from other sources. The contract provided that Manlove should receive 20 per cent. on all moneys collected and paid into the county treasury through his efforts, provided the amount should in no case exceed the county's share of such money. Manlove executed a bond to indemnify the county against any costs, expenses or damages by reason of his actions under the contract.

The bill alleges that the contract is *ultra vires* and void and prays for an injunction to prevent the parties from carrying it out.

The defendants filed an answer to the bill under oath, admitting the making of the contract but denying the right of appellee to maintain the bill and claiming that the board of supervisors had the power under the law to make the contract in question. The case was heard on the bill and answer and a decree entered making the injunctions, issued when the bill was filed, perpetual, and this appeal follows.

Assuming that the county had no power to enter into the contract, had appellee, by virtue of his being a citizen and a taxpayer, such an interest in the subject-matter of litigation as to enable him to maintain the bill?

The remedy by injunction being "the strong arm of equity" should never be resorted to except in a clear case of irreparable injury, and only allowed when the court is convinced of the urgent necessity. Courts of equity will not enjoin an illegal act, merely because it is illegal. The act must invade or threaten the property or civil rights of the complaining party. High on Injunctions, sec. 20,

(2nd ed.). In the case at bar the charge is that the contract in question is *ultra vires* and void. No acts under the contract are set out and none shown to have been performed. It is not charged in the bill that any omitted or unassessed personal property could or would be found or that any such existed nor that there was even a reasonable probability that everything would be unearthed by Manlove that would be collected by or even claimed to belong to the county. Merely entering into the contract created no liability of the county to pay Manlove any compensation, and the contract expressly exempts the county from any liability for costs, expenses or damages by reason of Manlove's action under the contract. It is said, however, that the answer avers that there was a large amount of omitted and unassessed property, amounting to many thousands of dollars, on which a large amount of taxes would become due, etc., and this is evidence of the fact omitted from the bill. If the averments of the bill were such as to make evidence of this fact relevant, it is true the admission in the answer would supply all needed proof, but it is not a question of evidence but one of pleading. The answer in this regard does not purport to answer any specific averment in the bill, but is setting up a state of facts in justification of the contract. An answer in equity is only evidence when it is responsive to the bill, and its statements are not made on information and belief. *Deimel v. Brown*, 136 Ill. 586.

We are aware that many cases can be found, decided by our Supreme Court, where bills in equity, filed by a taxpayer to enjoin the illegal expenditure of the revenues of cities and other municipalities, have been sustained, but we have been unable to find any case that has gone to the extent of holding that the performance of a contract will be enjoined solely on the ground that it is illegal without any averment that its performance will injuriously affect the public revenues. Waiving any further discussion of this question, it is apparent the principal contention is over the question whether the county had the legal right to enter into the contract. It is a well-established doctrine

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that counties are political divisions of the State for governmental purposes, and that they possess such powers as have been expressly conferred or necessarily implied. *Colton v. Hanchett*, 13 Ill. 616; *Perry et al. v. Kinnear*, 42 Id. 160; *Scates v. King*, 110 Id. 456.

Paragraph 3, sec. 24, ch. 34, Hurd's R. S. 1903, provides, that counties shall have power to make all contracts and do all other acts in relation to the property and concerns of the county, necessary to the exercise of its corporate powers. Among the powers of county board enumerated in sec. 25, ch. 34, R. S., are the following: "To manage the county funds and county business, except as otherwise specifically provided." Also, "To cause to be annually levied and collected taxes for county purposes, including all purposes for which money may be raised by the county by taxation."

Section 33 of the same chapter requires the board of supervisors to take proper measures to prosecute or defend all suits by or against the county, and all suits necessary to prosecute or defend to enforce the collection of all taxes charged on the State assessment. By section 276 of the Revenue Law it is provided that if any real or personal property has been omitted from assessment in any year or for any number of years the same shall, when discovered, be assessed by the assessor, and the average of taxes together with ten per cent. interest from the time the same should have been paid, shall be charged against said property.

That a valid claim exists for the proper amount of taxes which should have been levied against omitted property, is made clear by section 276 of the Revenue Law above cited. That section makes it the duty of the assessor to assess such omitted property when found. If property has been omitted, it is fair to presume that it was because the assessor failed to discover it. The contract with Manlove was intended to aid and assist the assessing officers to discover omitted property that had escaped taxation notwithstanding the official vigilance of the assessor. The duty is

imposed on the county board to manage the county business, to cause to be levied and collected county taxes, to prosecute and defend all suits necessary to collect all taxes on the State assessment, and the county has power to make all contracts and do all other acts in relation to the county property or concerns. Why, then, shall a contract to search for omitted property and report the same to the proper officers for assessment be held *ultra vires* and void? Taxation so levied that every person shall pay in proportion to the value of the property in his possession, is the constitutional mode of raising the revenue to meet the demands of government; without taxes there can be no revenue, without revenue no government, and without government no protection to life, liberty or property; it therefore follows that the levying and collection of the just share of taxes due from the property holders is one of the primary and vital concerns of the county. But it is said that granting the existence of the duty of the officials in this regard, they must be restricted to the use of the means and instrumentalities provided by the legislature to accomplish the purpose, and if they prove insufficient an appeal must be made to the legislature to provide others. There is much force in this argument; indeed its persuasive influence has led the Supreme Courts of California, Minnesota, North Dakota and Nebraska to hold contracts like the one under consideration *ultra vires* and void. *Grannis v. Board of Comrs.*, 81 Minn. 55; *Storey v. Murphy et al.*, 9 N. Dakota, 115; *House v. Los Angeles Co.*, 104 Cal. 73; *Platte Co. v. Gerrard*, 12 Neb. 244. It is true that these cases are decided with reference to the local statutes of the different States and therefore cannot be held as authoritative in this State, unless we had a similar statute which had not been differently construed by our own courts. A general rule underlying all the cases is that the power to prescribe the means of compulsory collection of taxes belongs to the legislature; still many courts of the highest authority hold that the remedies provided by statute are not exclusive, and any other appropriate action may be resorted to that will accomplish the end.

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In the following states it has been held that the legal levy of a tax creates an implied promise of the taxpayer to pay and that *indebitatus assumpsit* lies on such implied promise. Perry Co. v. Selma, etc., R. R. Co., 58 Ala. 547; Dubuque v. I. C. R. R. Co., 39 Iowa, 56; Appeal Tax Ct. v. Western Maryland R. R., 50 Md. 275; Putnam v. Fife Lake Tp., 45 Mich. 125; Bergen v. Clarkson, 6 N. J. L. 352; State v. Georgia Co., 112 N. Car. 34; State v. Memphis R. Co., 14 Lea (Tenn.), 56.

In this State it is provided by statute that the county board may cause an action of debt to be instituted to recover the personal property taxes which are shown to be delinquent by the collector's return. See section 230, ch. 110, Hard's R. S. 1903. Under the power conferred by this section it was held in Ottawa Gas Light Co. v. The People, 138 Ill. 336, that while it is made the duty of the State's Attorney to prosecute all suits on behalf of the people to recover debts, revenues, fines and forfeitures, still in the exercise of its powers, the county board could employ any competent attorney to bring the suit, in the name of the people, notwithstanding the state's attorney was able and willing to act. In this case it is said: "We are not disposed, however, to hold that the county board is, by the statute defining the duty of the state's attorney, denied the power and authority to select and empower any competent attorney to represent the people in the beginning and prosecution of suits to recover delinquent taxes.

* * * Whether or not resort shall be had to proceedings at law to recover of property owners the overdue and unpaid taxes levied thereon, rests in the discretion of the county board, and we have no doubt that under the general powers of the county board, as the fiscal agent of the county, it has the inherent right to direct the proceedings, and select the person and agencies through whom it will act."

In *McClaghry v. Hancock Co.*, 46 Ill. 356, it is held that the county board had the power to appoint an agent to buy books and stationery for the circuit clerk's office, notwithstanding the statute provides that the clerk of the Circuit and County Commissioners Court shall provide all

the necessary books, with a safe, press or presses, with locks and keys, and requiring the county commissioners to make allowances for the same, and for articles of stationery necessary for the respective courts. This case goes to the extent of holding that the county board can appoint such agent and give him the exclusive right to buy and supply the court, and that in such case the right, under the statute, of the clerk to buy would be superseded by the agent's contract, so long as he furnishes the necessary supplies. See *Barnard & Co. v. County of Sangamon*, 190 Ill. 116.

In *County of Franklin v. Layman*, 145 Ill. 138, it is held that the county board has the power to employ counsel to test the legality of bonds issued by the county in aid of a railroad, and to agree to pay a contingent fee for such services. In this case the county was not a party, in its corporate capacity, but the action was an application for judgment by the collector and exception filed by a citizen, which being overruled by the County Court, the attorney prosecuted an appeal to the Supreme Court, which resulted in a reversal of the County Court, the Supreme Court deciding that the bonds were illegally issued (see *Richeson v. People ex rel. Jones*, 115 Ill. 450), whereby Layman and Allen became entitled to their fees. These authorities from our Supreme Court, while not in all respects like the case at bar, seem to us to warrant this court in holding that the contract with Manlove is not *ultra vires* and void.

Similar contracts have been upheld by the Supreme Court of Indiana in *Richmond v. Dickinson*, 155 Ind. 345; *Garrigus v. Board of Com's*, 157 Ind. 103; *Fleener v. Litsey*, 66 N. E. Rep. 82 (Ind.). The case of *Gannaway v. McFall*, 109 App. 23, is in principle somewhat like the case at bar, but we are constrained to hold, that the view there expressed is opposed to the clear implication of our Supreme Court in the cases above cited, and for this reason we cannot follow that case.

For the reasons herein given the decree of the Circuit Court is reversed and the cause remanded, with directions to the Circuit Court to dissolve the injunction and dismiss the bill.

Reversed and remanded.

Hilka Oltman v. Fred Schoenbeck, et al.**Gen. No. 4,456.**

1. NOTICE—*when party to cause chargeable with.* In the absence of a rule of court, a party to the record in a cause is required to take notice of every step taken in the progress of the cause.

2. RULE OF COURT—*what does not establish.* A recital in an *ex parte* motion as to a prevailing practice, does not establish the existence of a rule of court with respect to such practice.

Motion for leave to perfect appeal. Appeal from the County Court of Livingston County; the Hon. C. F. H. CARITHERS, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed April 25, 1905.

H. H. McDOWELL, for appellant.

R. R. WALLACE, A. C. NORTON, C. J. AHERN and R. B. CAMPBELL, for appellees.

MR. JUSTICE VICKERS delivered the opinion of the court.

At the December term, 1903, the County Court of Livingston County entered an order directing the clerk to write up proper convening orders of certain previous terms of said court at which proceedings were had in a cause pending for leave to sell real estate to pay debts by the administrator of John Rutz, deceased, and to enter such orders *nunc pro tunc*.

Hilka Oltman, appellant herein, was a party to said proceeding, and appeared by counsel, and resisted the making of the orders at the December term, 1903, took exceptions thereto, and prayed an appeal to this court, which was granted by the court upon condition that appellant file an appeal bond in the sum of \$100 within twenty days, and present bill of exceptions in thirty days from December 8, the date of the order.

No appeal bond was filed, nor bill of exceptions presented during the December term, nor within the time fixed by the order of court. At the March term, 1904, appellant appeared in open court, presented her bond and bill

of exceptions, and made a motion, based on affidavits, that the bond be approved, and the bill of exceptions filed as of the December term, 1903, which was denied by the court, which ruling was excepted to, and this appeal is prosecuted to reverse that order.

The final order, allowing the appeal, was spread upon the records of the court on the day it was entered. The grounds set up as a reason why appellant had failed to file her bond and bill of exceptions within the time required by the order, is that she did not know the order had been written up. In the absence of a rule of court, a party to the record is required to take notice of every step taken in the progress of the case. *Niehoff v. The People*, 171 Ill. 243; *Domestic Building Ass'n v. Nelson*, 172 Id. 387.

Among other things, the following is set out in the motion :

"The practice of the said Probate Court has been as counsel is informed and advised, that on the allowance of an order or decree, the same should be shown to the opposing counsel before filing, or opposing counsel should be notified in some way that the same had been or was about to be filed; and this for the purpose of giving the opposing counsel opportunity to object, if he deemed said order or decree objectionable, and of filing the usual bill of exceptions."

This falls far short of showing a rule of court, requiring notice to appellant that the order had been prepared and filed.

The motion to dismiss the appeal, taken with the case, is overruled, and the judgment of the court denying leave to file the bond and bill of exceptions *nunc pro tunc* is affirmed.

Affirmed.

Dille v. Rice.

Jesse B. Dille v. F. E. Rice.**Gen. No. 4,459.**

1. **RULES**—*power of courts of record to make and enforce.* Courts of record have inherent power to make and enforce all reasonable and necessary rules for the transaction and regulation of their business; such rules, however, must not be contrary to the constitution and laws of the State.

2. **DISMISSAL**—*when improper.* The dismissal of an appeal from a justice of the peace because of the failure of the appellant to pay a fee required by rule of court, but not authorized by law, is improper and may be set aside on appeal.

3. **DOCKET FEE**—*when not chargeable by clerk of County Court.* There is no statute in this State which authorizes the charge by the clerk of the County Court of a fee of \$4 for docketing an appeal from a justice of the peace, and a rule of court which requires the payment of such a fee is contrary to law and void.

Motion to reinstate. Appeal from the County Court of Lee County; the Hon. ROBERT H. SCOTT, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed April 25, 1905.

H. A. BROOKS, for appellant.

E. E. WINGERT, for appellee.

MR. JUSTICE VICKERS delivered the opinion of the court.

F. E. Rice brought suit before a justice of the peace against Jesse B. Dille and others; Dille appealed to the County Court; the clerk of the County Court placed the case on the docket, and thereupon appellee made a motion to dismiss the appeal for a failure of appellant to pay \$4 docket fee before noon of the first day of the term.

On December 30, 1903, the County Court of Lee County made the following rule of court, relating to the payment of docket fees in cases appealed from justices of the peace:

“All appeal cases shall be docketed by the clerk as received and appellant shall pay to the clerk the docket fee of four dollars. In case said fee shall not be paid on or before 12 o'clock noon of the first day of the term following the filing of such appeal, the same shall be dismissed for

want of prosecution with *procedendo*, upon payment of fee therefor. It is further ordered that the above rule 'A' take effect and be in operation from and after this date, and that the clerk enter the same at large upon the record of the Court, and within fifteen days from this date mail to all attorneys at law resident within Lee County a copy of said rule."

After the order of dismissal was entered, and during the same term of court, appellant entered his motion to set aside the order of dismissal, and filed an affidavit showing he had a meritorious defense to plaintiff's claim. The motion was denied, and appellant excepted, and brings the record here by appeal, assigning error in the rulings of the court in dismissing the appeal and in refusing to set aside the order.

The power of the County Court to make and enforce the rule above set out is the only question presented for decision. All courts of record have the inherent power to make all reasonable and necessary rules for the transaction and regulation of their business. Am. & Eng. Ency., Vol. 4, p. 450, and cases there cited. Such rules must, however, not be contrary to the constitution and laws of the State. *Fisher v. National Bank of Commerce*, 73 Ill. 34.

Sec. 29, art. 6 of our constitution of 1870 provides: "All laws relating to courts shall be general, and of uniform operation; and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, * * * shall be uniform." All matters regulated by statute cannot be changed by a rule of court, since to permit rules of court to take the place of a statute would be to destroy the uniformity of practice and proceedings enjoined by the constitutional provision above cited. *Fisher v. National Bank*, *supra*.

By an act of the legislature, passed in 1872, relating to fees and salaries, and classifying the several counties of the State into three classes, the fees of clerks of the Circuit Courts in counties of the first and second classes were fixed by section 14 *seriatim* for each service to be performed. Section 18 of the same act made similar provisions for the

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clerks of the County Courts, with the following proviso: "Provided, however, that whenever the county clerk shall be required to perform similar service to those required of the circuit clerks, and no fee is specially provided for such service, they shall be allowed for such services the same fees as herein allowed to circuit clerks." As long as section 14 remained in the statute as originally enacted, the fees therein fixed for the circuit clerk applied to the county clerk, where similar services were required and no special fee was fixed therefor by law. In 1899 the whole of section 14 as it had stood theretofore was repealed, and a new section was enacted, providing an entirely new scheme for taxing the fees of the circuit clerk. By the law of 1899, the circuit clerk is allowed a specific sum in each case, which in appeals from justices of the peace to the Circuit Court is \$4, which, together with \$1 to be paid by appellee for entering his appearance, is in full of all service during the progress of the suit to the final determination thereof. See Laws 1899, p. 217.

While it is not expressly so provided in the law of 1899, the implication seems to be that the fees therein provided are to be paid in the first instance by the plaintiff, complainant, petitioner or appellant, as the case may be, in advance; at least such is the practice generally in the State so far as we are acquainted with it.

It is suggested that under the proviso of section 18, above set out, the County Court had the power to make the rule in question. This cannot be true, for the following reasons: The proviso in section 18 only authorizes a substitution of the fees allowed to the circuit clerk, in cases where like services are required and no special provision is made for the fees. All, or substantially all, of the services required of a clerk of a County Court in the progress of an ordinary appeal from a justice of the peace are specifically provided for in section 18 as it is now, and has been since it was originally enacted in 1872. For instance, a special fee is fixed for issuing summons, subpoena or other process, for administering oath to each witness, for swearing persons to

affidavits and filing same, for entering judgment, for issuing execution, for docketing the same, for making bill of costs, for filing each paper in the suit, for taking bond, filing and recording the same, and for calling and swearing each jury. The \$4 fee, allowed the circuit clerk in appeal cases, is in lieu of allowances somewhat similar to these by section 14 as it stood before the amendatory act of 1899. Certainly it cannot be held that the amendatory act of 1899 repealed by implication these several clauses of section 18. No such intention can be gathered from the act itself, and it cannot be said that the fees provided in the new act for the clerk of one court are so inconsistent with those provided for a clerk of another court, that both may not stand. If \$4 is demanded of the appellant and \$1 from appellee, what services are to be covered thereby? Not those above enumerated, for as we have already pointed out, they are specially provided for in section 18.

Again, the language of the proviso is peculiar and requires a close scrutiny. It is to be noted it provides that when the county clerk is required to perform similar services to those required of the circuit clerk and no fee is specially provided for such service, the county clerk shall be allowed for such services the same fees as are herein allowed to circuit clerks. The word "herein" evidently refers to the law of 1872, where it first occurred. If the proviso read, "such fees as now are, or may hereafter, be provided by law for circuit clerks for like services," it would have an entirely different meaning; but since the county clerks are only to be allowed such fees for unprovided-for services as are herein (by this law) provided for circuit clerks, we know of no rule of construction that would make the proviso apply to an entirely different scheme of fees provided by another law enacted years afterward.

If the clerk of the County Court may collect the \$4 fee in appeal cases, he may, with like reason, collect \$6 in all common law cases in counties of the first and \$5 in counties of the second class, and \$16 or \$20 in proceedings to exercise the right of eminent domain according to the class of the county.

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In our opinion, it would be nothing short of judicial legislation to hold that the proviso now under consideration had the effect of making the law of 1899 applicable to clerks of the County Court.

A question somewhat analogous to this arose in *Kinsey v. Sherman*, 46 Iowa, 463. The statute of Iowa provided that the clerk of the additional penitentiary at Anamosa should receive pay in the sum and manner as the clerk at Fort Madison. At this time the salary of the clerk of the penitentiary at Fort Madison was \$62.50. Subsequently the legislature enacted chapter 76, making an increase of \$500 per annum in the clerk's salary at Fort Madison. The Supreme Court held the increase did not apply to the clerk at Anamosa. Another case very similar to the one at bar is *Johnston v. Lovett*, 65 Ga. 716. In 1876 the legislature established a court for the county of Burke with a solicitor whose fees were to be the same as those allowed the solicitor-general for like services. In 1879 the legislature increased the fees of the solicitor-general, allowing the additional sum of \$5 for each trial or plea of guilty filed in a criminal case, and under this state of facts the solicitor of Burke County was held not entitled to this increase of fees. See, also, *Meachem's Public Officers*, sec. 857.

That there is no reason for the discrimination between clerks of the two courts, in the amount or manner of compensation for the same or similar services, is an argument to be addressed to the law-making power, and not to the courts, whose duty is, not to make the law, but to ascertain and declare it as made by the legislative branch of the government.

This case is unlike the line of cases of which *Edwards v. Duling*, 36 Ill. 351, *Garrity v. Bash*, 84 Id. 73, and *Meserve v. Delaney*, 112 Id. 353, are illustrations. In these cases the appeal was dismissed for non-payment of statutory fees, after a rule had been entered on appellant to repay them.

In *Edwards v. Duling*, *supra*, the statute required (Ses-

sion Laws 1863, p. 49) the payment of \$1 as a docket fee, and provided that no suit at law or in chancery should be docketed until the fee was paid. The appellant having perfected an appeal, but neglected to have it docketed, the appellee paid the docket fee and took a rule on appellant to repay the same; and it is held that the appellant having failed to repay the fee, or show cause against the rule, it was proper to dismiss the appeal for want of prosecution.

Garrity v. Bash, *supra*, is a case in all respects like Edwards v. Duling, and the holding in the former case is adhered to.

In Meserve v. Delaney, *supra*, the former decisions are reviewed and affirmed, so that the power of a court to dismiss an appeal for a refusal to pay such legal fees as by law the appellant is required to pay, after the same have been paid by the appellee and a rule entered on appellant to repay the same, or show cause against the rule, may be regarded as firmly established as a rule of practice in this State. See cases above cited.

But in all these cases it is to be noted that the fees, for the non-payment of which the appeals were dismissed, were the fees allowed by law, and not such a sum as the court by rule had established.

The case at bar is, in many respects, like the case of City of Pekin v. Dunkelburg, 40 App. 184. There the court dismissed the appeal for the non-payment of \$3 as a docket fee fixed by rule of court; and the case was reversed for the reason the court had no power to fix fees.

Fees of public officers must be established by law, and where the law provides for the performance of a public duty by an officer and no fees are provided, the service must, nevertheless, be performed, since all public offices are accepted *cum onere*.

There being no law requiring the payment of the \$4 as a docket fee, the court had no power to make the rule in question. It follows that the court erred in dismissing the appeal and in refusing to reinstate the cause; for which the judgment is reversed and the cause remanded.

Reversed and remanded.

Henry Holmes, et al. v. Theodore Horn.**Gen. No. 4,477.**

1. **CONSIDERATION**—*parol evidence competent to establish, of a written instrument.* It is competent to show by parol the true consideration of a promissory note.

2. **CONSIDERATION**—*burden of proof to impeach.* The burden of proof to impeach the consideration of an instrument in suit, is upon the defendant.

3. **PRIVILEGED COMMUNICATIONS**—*what constitutes.* Information obtained by an attorney from his client is privileged and it is error to permit him to testify thereto over the objection of the client.

4. **PREPONDERANCE OF EVIDENCE**—*when instruction upon, erroneous.* An instruction is erroneous which lays down the rule that if two witnesses of equal credibility testify directly opposite to each other on a question of fact, that the party holding the affirmative of the proposition would not have a preponderance of the evidence.

5. **PROMISSORY NOTE**—*what establishes prima facie case in suit on.* The introduction in evidence of a promissory note establishes a *prima facie* case.

Action of assumpsit. Error to the Circuit Court of LaSalle County; the Hon. RICHARD M. SKINNER, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed April 25, 1905.

E. L. PERSONS and HUTTMANN, BUTTERS & CARR, for plaintiffs in error.

DUNCAN, DOYLE & O'CONOR, for defendant in error.

MR. JUSTICE VICKERS delivered the opinion of the court.

On July 23, 1877, Theodore Horn executed his promissory note, due in sixty-five days, payable to the order of Henry Holmes, Henry Walther and Samuel Dreifus, for the sum of \$2,000, with six per cent. interest from date. The present suit is upon that note.

A stipulation was entered into permitting both parties to introduce any competent evidence that might be introduced under a proper count in the declaration or properly drawn pleas. A trial was had which resulted in a verdict for defendant in error. After overruling a motion for a new trial, the Circuit Court rendered judgment against

plaintiffs in error for costs, to reverse which this writ of error is sued out.

The principal errors relied upon to reverse this judgment are, that the court admitted improper evidence on behalf of defendant in error, and that the court erred in giving instructions.

The evidence tends to show that defendant in error had contracted to erect a large building in the city of Ottawa for Sherwood, and that he entered into a bond for the faithful performance of his contract, with Holmes, Walther and Dreifus as his sureties. The bond purports to have been executed three days before the date of the note.

Plaintiffs in error contend that the note was given for \$2,000 borrowed money, while defendant in error contends that the note was executed to plaintiffs in error as a sort of indemnity to secure the plaintiffs in error as sureties on his bond.

Inasmuch as this judgment must be reversed, for the errors hereinafter pointed out, we will not discuss the evidence bearing upon these respective contentions of the parties, and will only refer to it for the purpose of determining the admissibility of certain testimony that was offered by defendant in error.

Plaintiffs in error contend that the court erred in admitting evidence tending to show that the true consideration for this note was to secure them as sureties upon this bond. This contention is based upon the well-known rule that parol evidence cannot be received for the purpose of varying or contradicting the terms of a written instrument; this contention cannot be sustained.

Our statute provides that where the consideration upon which a note was made or entered into has wholly or in part failed, or where there was a want of consideration, the defendant may plead such defense, and if it appear that such note was entered into without a good or valid consideration, or that the consideration has wholly or in part failed, judgment shall be given accordingly. Chapter 98. sec. 9, R. S. of Illinois.

In view of the stipulation upon which this case was tried

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all relevant evidence that is otherwise free from objection, which tended to show the true consideration for this note, was properly admitted. *Taft v. Myerscough*, 92 Ill. App. 560; *Bullen v. Morrison*, 98 Ill. App. 669, and cases there cited.

The note in question was a judgment note, and on which a judgment had been confessed shortly after the note became due. This judgment remained of record from 1877 until 1903, when it was opened up for the purpose of permitting defendant in error to plead.

At the time the confession of the judgment was entered D. McDougall was attorney for plaintiffs in error in said suit; his name appears as attorney to the declaration. On the trial of this case, Mr. McDougall was introduced as a witness by defendant in error, and among other things testified, over the objection of plaintiffs in error, as follows:

“Q. What was the purpose of entering judgment on the note? A. My best recollection is, that it was entered for the purpose of protecting the sureties upon the bond of Theodore Horn to Frederick A. Sherwood on a building contract.”

Previous to the above answer, plaintiffs in error had objected to Mr. McDougall's testifying to anything that may have come to him by virtue of his relation as attorney for plaintiffs in error; this objection was overruled, the court holding that the privilege merely extended to the witness.

The admission of this evidence was erroneous. Mr. McDougall having been attorney for plaintiffs in error, any information that he may have received from his clients as to the purpose in entering judgment on this note is a privileged communication, and the privilege may be invoked for the protection of the client's interest. If the information upon which this answer is based came to the witness from any other source than the parties to the suit, then the evidence is clearly hearsay, and should, for that reason, have been excluded; this evidence had a direct bearing upon the issue being tried respecting the consideration for this note. The jury would very naturally conclude that if the purpose in entering judgment was to protect the interests of plaintiffs in error as sureties on this bond, that

the consideration for the note was to indemnify them as such sureties.

At the request of defendant in error, the court gave the jury the following instruction:

"The jury are instructed that the burden of proof in this class of cases is always upon the party holding the affirmative; and any material matter asserted by one party and denied by the other can only be proved in law by a preponderance of the evidence; and in this case if the jury find from the evidence that the plaintiff has proved that he loaned the defendant the sum of \$2,000.00, by only one witness, and that he is contradicted in that respect by a witness of equal credibility and means of knowledge, then, as a matter of law, the plaintiff has failed to prove that he made such a loan to the defendant by a preponderance of the evidence, unless in the minds of the jury there have been facts or circumstances proved corroborating the plaintiff's testimony sufficient to outweigh the testimony on the part of the defendant."

This instruction is clearly erroneous for more than one reason; in the first place, it undertakes to lay down a rule that if two witnesses of equal credibility testify directly opposite to each other on a question of fact, that the party holding the affirmative of the proposition would not have a preponderance of the evidence.

There are some expressions in *McFarland v. The People*, 72 Ill. 368, which seem to sustain the rule of law announced in the above instruction, but that case has long since been overruled by *Johnson v. The People*, 140 Ill. 350, where it is held that the competency of witnesses to testify is a question of law for the court, but their credibility is a question of fact for the jury.

Second, this instruction deprives plaintiffs in error of the *prima facie* case, which the note itself makes; and lastly, the instruction places the burden of proof as to what the consideration of the note was upon plaintiffs in error, when, under the law, the burden of impeaching the consideration is upon the defendant in error.

For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

German-American National Bank v. Hoffman.

**The German-American National Bank of Aurora v.
Minnie B. Hoffman, et al.**

Gen. No. 4,481.

1. FRAUDULENT CONVEYANCE—*burden of proof to establish.* The burden of proof is upon the party alleging it to establish the fraudulent character of a conveyance; all presumptions are in favor of the honesty and good faith of the transaction.

2. FRAUDULENT CONVEYANCE—*what proof essential to establish.* In order to justify a decree declaring a conveyance fraudulent and void, the proof must show that both parties participated in the fraudulent intent.

3. FRAUDULENT CONVEYANCE—*mere preference does not constitute.* A debtor has a right to prefer a creditor and the mere fact that he does so in making a conveyance of his property, does not render such conveyance fraudulent.

Bill in nature of creditor's bill. Appeal from the Circuit Court of Kane County; the Hon. CHARLES A. BISHOP, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed April 25, 1905.

FRANK G. PLAIN and R. G. MONTONY, for appellant.

CHARLES WHEATON, for appellees.

MR. JUSTICE VICKERS delivered the opinion of the court.

This is a bill in equity filed by The German-American National Bank of Aurora, Illinois, against Minnie B. Hoffman and Gustavus A. Hoffman and Christian Abel, administrator of the estate of Amelia Hoffman, to set aside a conveyance made by Amelia Hoffman and her husband, Conrad Hoffman, to Minnie B. and Gustavus A. Hoffman, on the ground that the conveyance was made with a fraudulent intent to hinder and delay the appellant in the collection of its debt against Amelia and Conrad Hoffman.

The answers of Minnie B. and Gustavus A. Hoffman deny all of the material allegations of the bill, while the answer of the administrator of Amelia Hoffman admits the allegations of the bill. Upon a hearing in the Circuit

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Court, a decree was rendered dismissing appellant's bill, and the case is brought to this court by appeal.

The evidence shows that Conrad and Amelia Hoffman were husband and wife, and that Minnie B. and Gustavus A. were their children. Prior to March 1, 1897, Conrad Hoffman owned a homestead on LaSalle street in the city of Aurora, where he and his wife resided; he also owned a business house where he conducted a cigar business since 1864.

Gustavus Hoffman was about 35 years of age, but the evidence shows that he had continued to work for his father until about the year 1900; Minnie B. was also of full age. She had been for a number of years engaged in earning her own living by teaching school in the public schools of Aurora. The business of Conrad Hoffman had fallen off, until in the year 1897, he was financially embarrassed. Before this time he had an endowment insurance policy on his life payable to Amelia, his wife; this policy was collected, and the money was used by Conrad to apply on his debts. Just when the policy matured is not shown. Conrad never repaid his wife, except by the conveyance hereinafter mentioned.

Conrad Hoffman was indebted to appellant \$939.31 for money borrowed, which was represented by several notes with interest, payable to the bank. On March 1, 1897, Conrad conveyed his homestead and also his store property to his wife, Amelia; the grantee, however, did not join in the deed; the consideration mentioned in this deed is \$8,000, but there is no evidence of any other consideration than the proceeds of the endowment insurance policy and whatever interest may have accrued on it, the original amount of which was \$1,000. So far as the evidence shows, Conrad Hoffman was not indebted to any other person than appellant, except his indebtedness to his wife on account of the insurance policy, and his indebtedness to his children, which is hereinafter stated.

After the conveyance to Mrs. Hoffman, the appellant bank, having learned of the execution of the deed, called on Conrad Hoffman for an adjustment of his debt. The

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matter was adjusted by giving a new note signed by Conrad Hoffman and Amelia, his wife. The effect of this transaction was to give appellant the full amount of security that it had before the property was conveyed to Mrs. Hoffman. Subsequent to this, and on the 8th day of August, 1898, another note for \$75. was executed to appellant by Amelia and Conrad Hoffman for borrowed money. On the 6th day of August, 1900, and while these notes were still unpaid to the bank, Amelia Hoffman conveyed the real estate, which she had obtained from her husband, to appellees, her husband joining in the deed. Within a short time after the execution of this deed Amelia Hoffman died. In addition to the indebtedness to appellant, Mrs. Hoffman was indebted to other parties in the sum of \$150 for improvements made on the Main street store.

It is this last conveyance from Amelia Hoffman and her husband to their children which is sought to be set aside as fraudulent by the present suit. Appellant probated its claim against the estate of Amelia Hoffman, which, together with unpaid interest, amounted to \$1,078.20, no part of which has been paid.

Appellant's contention is, that the conveyance to appellees is fraudulent and void; that the same was made with an intent to hinder and delay the creditors of the grantors. The errors assigned and insisted upon present the single question of whether, under the evidence, the court was justified in dismissing appellant's bill.

The evidence shows that upon the date of the execution of the deed to appellees that Gustavus Hoffman held notes against his father, part of which were also signed by Amelia, amounting with accrued interest, to something more than \$1,600, and that this money was due for services rendered by G. A. Hoffman to his father after he had attained his majority. It also appears that Gustavus had, on two or three occasions, quit his father's employment because he had not received his money; it also appears in evidence that Minnie B. had loaned her mother money which she had earned as a teacher, and held her mother's notes, se-

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cured by a mortgage upon the homestead property, for \$350, and that there was due her also for money which she had advanced to pay taxes upon the homestead \$150; and it is also shown that she had advanced other sums of money to her mother with which to pay interest upon a mortgage that was upon the store property. The aggregate amount of indebtedness due appellees at the time of the conveyance was approximately \$2,200, which formed a part of the consideration for the deed in question. There was a mortgage of \$3,500 principal, with two years' accrued interest at six per cent. due on the store property; and it was also shown that the store property had been sold for taxes; and that there were special assessments for paying purposes against the store property amounting to \$150; the total amount of the encumbrance, taxes and other charges against the store property was \$4,252.71. The homestead was encumbered by the \$350 mortgage due Minnie B. The encumbrances upon the two pieces of property is thus shown to be something over \$4,700; to this should be added \$1,000 exemptions in the homestead, which could not be the subject of a fraudulent conveyance; adding to this the amount of indebtedness existing in favor of appellees, the consideration for this conveyance is shown to be about \$8,000.

We have examined the evidence bearing upon the question of the value of the properties at the time of this conveyance, and without entering into a discussion of it in detail, we are satisfied with the finding of the court that there was no such inadequacy of consideration as to warrant an inference of fraud.

It was incumbent upon appellant to establish the allegations of its bill that this conveyance was made with the fraudulent purpose charged; all presumptions are in favor of the honesty and good faith of the transaction; and where fraud is alleged, the burden is cast upon the party charging it to establish it by clear and satisfactory proof. *Hatch v. Jordon*, 74 Ill. 414; *Callahan v. Ball*, 197 Id. 318.

In order to justify a decree declaring a conveyance fraudulent and void, the proof must show that both parties

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participated in the fraudulent intent. *Murry Nelson & Co. v. Leiter*, 190 Ill. 414.

The evidence in this case wholly fails to show that either of the appellees had any notice of the existence of appellant's debt. The deed appears to have been made in good faith, for the purpose of paying appellees for money that was *bona fide* due them, and that the consideration paid and assumed is substantially all that the property was worth at the time the deed was made.

The grantors in this deed had the right to prefer appellees and to convey to them, in good faith, a sufficient amount of real estate to pay them whatever was actually due. *German Insurance Company v. Bartlett*, 188 Ill. 165; *Bank v. Lyon*, 185 Ill. 343.

But we do not regard the conveyance from Conrad Hoffman to his wife as being directly involved in this suit. Even though it may be true that appellant could have maintained a bill as against this conveyance, still we regard the taking of the note signed by Amelia Hoffman and her husband after this conveyance, as a waiver of any right appellant might have to question the good faith of that conveyance. So far as the conveyance to appellees is concerned, the evidence in this record is scarcely sufficient to raise a suspicion of fraud, much less to prove it by a preponderance of the evidence.

Finding no error in the record, the decree of the Circuit Court is affirmed.

Affirmed.

L. B. Judson v. Alfred M. Schlee.

Gen. No. 4,474.

1. CONTINUANCE—*when denial of motion for, is not improper.* It is not improper to deny an application for a continuance where the opposing party admits that the absent witness would swear as set forth in the affidavit therefor, where there is no showing that the personal attendance of such witness is essential to the due trial of the cause and

it appears that there was no reasonable probability that such personal attendance could be procured if the continuance were granted.

Action of assumpsit. Appeal from the Circuit Court of Kendall County; the Hon. CHARLES A. BISHOP, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed April 25, 1905.

A. C. LITTLE, for appellant.

SEARS & SMITH and JOHN FITZGERALD, for appellee.

MR. JUSTICE VICKERS delivered the opinion of the court.

This is an action of assumpsit to recover money alleged to have been paid by appellee to appellant without any valuable consideration.

Appellee recovered a judgment for \$1,000, from which this appeal is prosecuted. A man by the name of Gibson, claiming to be the owner of patents for a shoe scraper and cleaner, a wrench and a coupler, came to Aurora where appellant, Judson, was practicing law.

Gibson and appellant became acquainted, or rather renewed a previous acquaintance. Within a short time, an unsigned advertisement appeared in one of the city papers for a business partner; appellee answered the advertisement, and his letter came into the hands of Judson. A meeting was arranged between appellant and appellee. After impressing appellee with the great selling qualities of the patents held by Gibson, appellant went with appellee to Gibson's hotel to see him and the patents.

It is the claim of appellee that Gibson and Judson had entered into some sort of conspiracy to induce him to put his money into these patents. Appellant pretended to be buying certain territory of Gibson and wanted appellee as his partner. Appellant said he had been advised by his physician to quit his practice and go on the road, and that he wanted an honest man to take charge of the office and attend to shipping the patented articles which he would sell; he wanted a partner and appellee, an entire stranger, filled the description of what appellant would like in a confidential man to have sole charge of the management of

Judson v. Schlee.

the very large business then under contemplation. Appellee was a farmer, with very limited experience in business affairs. The parties went to Chicago and rented a room.

An advertisement was put in one of the Chicago papers, and answers from numerous persons, apparently willing to pay fabulous prices for territory to sell the "shoe scraper and cleaner," the "wrench" and the "coupler," began to come to the parties. Gibson and appellant answered these letters in person. Appellee never saw any of the anxious investors, but heard much of them through his newly made friend, Judson. In one instance a letter, purporting to come from a Mrs. Green, was answered by appellant; she wanted eight counties, and appellant brought back a contract purporting to have been signed by Mrs. Green agreeing to pay \$3,500 for eight counties. She had the money, and the only thing to do was to make her a deed to the counties, but unfortunately, it was said, a part of these counties which Mrs. Green was so eager to secure had been sold by Gibson to another party; they must be bought back in order to enable the parties to consummate the deal with the so-called Mrs. Green. In the meantime, a partnership had been arranged by which appellant and appellee were to become each one-third owners of all the territory of the United States, and the Green sale was only a beginning of the great things to follow.

In order to buy in the two or three counties which appellant says had been sold to a man whose name was either Johnson, Stephenson or Jones, he had forgotten which, required a little money, and appellee put up \$500 which was paid to appellant, and appellant pretends to have gone out in search of Johnson, Stephenson or Jones, to buy in the missing counties. In the meantime, Mrs. Green's appreciation of the great value of the patents seems to have grown on her, and she now wanted other territory for \$9,500. Some pretended differences coming up between Gibson and Judson, Judson makes a pretense of selling out all his interest in the whole business for \$1,500 and readily accepts the unsecured note of Gibson for the amount, and prepares

to return to Aurora and resume the arduous duties of his profession, which a solicitude for his failing health had induced him to abandon less than a week before. Before taking his departure, he advised appellee to sell out if he could, and appellee fell into the trap thus cunningly set for him by appellant, and accepted the worthless note of Gibson for \$1,950 for \$1,725 actual cash he had parted with to Gibson and appellant during the few days he had been under their influence. Of the money paid out, \$1,000 of it went into the hands of appellant, while \$725 seems to have been paid to Gibson; hence the verdict of \$1,000 against appellant.

From a careful consideration of the evidence, we are constrained to believe that there was a combination entered into between appellant and Gibson for the purpose of defrauding appellee out of his money. This being true, we cannot agree with appellant in his contention that the verdict is contrary to the law and the evidence.

Before the trial was entered upon, appellant made a motion for a continuance on account of the absence of Gibson, whose testimony he desired. The court held the affidavit sufficient, and thereupon appellee admitted the affidavit, and the court required appellant to go to trial. Appellant contends that the admission of the affidavit by appellee did not justify the court in refusing the motion for a continuance. Section 44 of the Practice Act (Hurd's R. S. 1903, p. 1343) provides, that if the other party will admit the affidavit, the cause shall not be continued. The case of *Hopkinson v. Jones*, 28 App. 409, relied on by appellant, does not sustain his contention; it is said in this case that the personal presence of a witness is often as important as his testimony, and where the importance of such personal presence is clearly shown by the affidavit, the motion ought not to be overruled because the opposite party will admit the affidavit. Appellant's affidavit does not come within the rule laid down in the above case; no suggestion is made to the court of the importance of having the personal presence of Gibson at the trial, nor is it shown that

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there was the remotest probability that such personal attendance could be procured if the continuance had been granted. The sole grounds set up in the affidavit why a continuance was wanted were to give appellant an opportunity to take his deposition. There was no error in denying the motion for continuance after the affidavit was admitted by appellee.

We are entirely satisfied that the judgment in this case does substantial justice, and that no error has intervened requiring a reversal; accordingly the judgment of the Circuit Court is affirmed.

Affirmed.

Elgin, Aurora & Southern Traction Company v. Natalie Wilson.

Gen. No. 4,471.

1. **NEGLIGENCE**—*what, no defense to action for injuries occurring by reason of.* It is no defense to an action for injuries occurring by reason of the negligence of the defendant that the negligent or tortious act of a third person or an inevitable accident or an inanimate thing contributed to cause the injury to the plaintiff if the negligence of the defendant was an efficient cause without which the injury would not have happened.

2. **NEGLIGENCE**—*when rate of speed constitutes.* Whether a given rate of speed constitutes negligence depends upon the surrounding circumstances of each case.

3. **NEGLIGENCE**—*when giving of erroneous instruction upon question of, not reversible error.* Whether the giving of an instruction upon the subject of the defendant's negligence, which does not limit a recovery to that negligence specifically charged, constitutes reversible error, depends upon the circumstances of the case and the language and purport of all the instructions given.

4. **EFFICIENT CAUSE**—*how question of, determined.* Unless the evidence is such that all reasonable minds would agree that the efficient cause of an injury was not the negligence alleged against the defendant, the question of what was the efficient cause of such injury must be submitted to the jury as a question of fact.

5. **CONDITIONS AFTER ACCIDENT**—*when proof of, competent.* Observations made immediately or so soon after the main fact in issue as to preclude the possibility of a change in conditions, are relevant where they may throw light on the point of inquiry.

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6. *EXPERIMENTS—when proof of, not incompetent.* The mere fact that experiments are made after an accident does not make them incompetent; they are incompetent, however, if the conditions existing at the time they are made are different from those pertaining at the time of the accident.

7. *VARIANCE—what does not constitute.* Proof that the plaintiff's arms and legs were broken is consistent with the allegation that the bones of the plaintiff's "body" were broken, as the term "body," in law, includes the entire person of the plaintiff.

8. *DECLARATION—when not error to permit jury to take, in their deliberations.* It is not reversible error to permit the jury to take with them upon their deliberations the entire declaration, notwithstanding some counts thereof have been eliminated where such eliminated counts are substantial repetitions of the counts remaining upon which the case was tried.

Action on the case for personal injuries. Appeal from the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed April 25, 1905.

HOPKINS, DOLPH & SCOTT and RUSSELL & HAGELHURST,
for appellant.

WALTER E. HEALY and MURPHY & ALSCHULER, for
appellee.

MR. JUSTICE VICKERS delivered the opinion of the court.

Appellee brought this suit for personal injuries received while a passenger on one of appellant's electric street cars. She recovered a judgment for \$3,000, to reverse which this appeal is prosecuted.

The accident happened by reason of the car, on which appellee was a passenger, running on a siding and colliding with other cars standing on the side-track. A game of base-ball was being played at the ball park, which is located on appellant's line about one mile north of the city of Elgin. Four or five cars, for the accommodation of people who were attending the ball game, were standing on the siding west of the ball park. The switch which connected the siding with the main track, was at the south end of the siding. The collision occurred about 200 feet north of the south end of the switch. The switch was wrongfully turned

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by a boy, which permitted the car, on which appellee was a passenger, to take the siding. The weight of the evidence shows that the car was running at about thirty miles per hour; the cars were partially telescoped, so that it was with considerable difficulty they were separated.

Appellee received a transverse fracture of the tibia, and other injuries, for which she has recovered damages in this suit. The negligence charged is improper and negligent operation and management of the car, failure properly to lock and guard the switch, failure to look ahead and observe that the switch was open and negligently running the car at a high and dangerous rate of speed.

It is contended by appellant that the switch, having been open by the tortious act of a stranger, it is not liable for the injury. This position must be sustained, unless some of the negligent acts charged in the declaration are shown by the preponderance of the evidence to have operated jointly with the tortious act of the third party, and thereby contributed to the injury, in such degree, that the jury, acting reasonably, under the evidence, can say that the accident would not have happened but for the negligence of appellant.

The rule on this subject, frequently announced both by the Appellate and Supreme courts, is that it is no defense to an action for injuries occurring by reason of the negligence of a defendant that the negligence or tortious act of a third person or an inevitable accident or an inanimate thing contributed to cause the injury to the plaintiff, if the negligence of the defendant was an efficient cause, without which the injury would not have happened. The following cases will be found to sustain the foregoing rule and illustrate its application to the various conditions of fact involved: *City of Joliet v. Verley*, 35 Ill. 58; *Village of Carterville v. Cook*, 129 Id. 152; *City of Joliet v. Shufeldt*, 144 Id. 403; *Pullman Palace Car Co. v. Laack*, 143 Id. 242; *St. Louis Bridge Co. v. Miller*, 138 Id. 465; *McGregor v. Reid, Murdoch & Co.*, 178 Id. 464; *C. & A. R. R. Co. v. Harrington*, 192 Id. 10; *Armour v. Golkowska*, 202 Id. 144; *Commonwealth Electric Co. v. Rose*, 214 Id. 545.

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The difficulty is not so much in determining what the rule is, as in its application to the facts of different cases as they arise.

The question resolves itself into whether the appellant is shown to be guilty of any of the acts of negligence charged, which can be said to be an efficient cause of the injury. Under the state of this proof, this question must be treated as one of fact, and not of law; it was a proper question to be submitted to the jury. It is, by no means, one of those cases where all reasonable men of fair intelligence would agree that appellant was guilty of none of the negligence charged against it. It appears quite probable that the motorman was guilty of inattention to his duties. He says he did not see the switch as he approached it. He claims he was watching some boys whom he suspected might try to cross the track in front of the car.

The track was straight, and no obstruction for several hundred feet before the switch was reached; it was a clear day, about 4:45 in the afternoon, on August 2, 1902. Just before the switch was reached, it is shown the motorman had his face turned toward the ball game.

It is also shown, as already pointed out, that the rate of speed was about thirty miles an hour; it is true the motorman and one or two others testify to a much slower rate of speed, but the weight of the testimony strongly tends to show the higher rate of speed. In this connection, the damage done to the cars by the collision; the fact that the motorman was thrown from his stool so violently that he was rendered unconscious by the lurch of the car when it first entered the open switch and before the collision occurred, are circumstances which have a tendency to show the rate of speed was more than twelve to fifteen miles an hour, as shown by the motorman. Whether a given rate of speed is dangerous, and consequently negligence, depends on surrounding circumstances.

In a late case, *Chicago City Ry. v. Bennett*, 214 Ill. 26, it is held that fifteen miles an hour, on a dark night when the track was slippery, is such a rate of speed as warrants

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the submission of the question to the jury as one of fact. Here it is admitted the motorman knew there were a large number of people assembled outside the ball park fence near the track, and that they were passing back and forth over the track; he also knew the switch and siding were there, and if he were running at thirty miles an hour under these circumstances, and paying no attention to the switch, we are not disposed to find fault with the jury if it finds these acts to be negligence.

Again, it is shown that appellant had stationed an employe by the name of March at this switch to look after it and see that it was properly turned; after the cars had been placed on the siding, March turned the switch so as to give all cars the main track, but he did not lock, or otherwise fasten the switch, and at the time the boy turned it and when the accident happened March was inside the ball park, with a tight board fence seven feet high between him and the switch he was set to guard. He had not been to look after the switch for an hour before the accident. We think this conduct grossly negligent on the part of this employe. If the jury found, as they very reasonably might, that appellant was guilty of negligence either in respect to the rate of speed, the manner of operating the car by the motorman, or the guarding or locking the switch, we would not be disposed to disturb the verdict on the ground that it was not supported by the evidence. It follows from these observations that the verdict of the jury must be regarded as settling the controverted questions of fact involved adversely to the contention of appellant. It only remains to be determined whether any error of law has intervened of such character as to require a reversal.

The first complaint made is, that the court erred in refusing appellant's request for a peremptory direction to find the defendant not guilty; this contention is disposed of by our reference already made to the facts. The second, that the accident was caused by the tortious act of a third party, is also disposed of and need not be further considered.

It is contended the court erred in admitting evidence of

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the condition of the cars immediately after the collision and the efforts required to separate them. As we have already seen, this evidence had a tendency to show the force of the collision, and hence bears upon the rate of speed. Observations made immediately or so soon after the main fact as to preclude the possibility of a change in conditions, are relevant where they may throw light on the point of inquiry. We are aware of no authority holding a rule that would exclude this evidence.

It is next said that the court erred in admitting the evidence of two witnesses who testified that they had ridden in the front end of a car going north and that the switch could be seen for a distance of 300 feet. The basis of this objection is that these experiments were made subsequent to the accident, and that the evidence did not show the essential conditions to be the same as on the day of the accident. The rule on this subject, as we understand it, is that if the conditions are essentially different when the experiment is made from those existing at the time the fact sought to be illustrated occurred, the results of the experiment would have no legitimate bearing on the issue. *Chicago City Ry. Co. v. Brecher*, 112 App. 106, and cases there cited. It is competent, however, to show by experiments conducted under similar conditions, how far a train can be seen approaching a crossing from a highway. *E., J. & E. Ry. Co. v. Reese*, 70 App. 463.

In the case at bar, the uncontradicted evidence is that the accident happened in the afternoon on a clear day; the motorman says he was looking ahead, and as far as he could see, everything was perfectly clear, except as he came up there were some boys ahead of him who attracted his attention, and he looked at them to see that they did not run out ahead of him. We cannot imagine conditions more favorable to seeing a switch than those described by the motorman; he does not place the boys between himself and the switch, but mentions their presence to explain why he looked at the boys instead of the switch. If any dissimilarity existed in the conditions of the two occasions, it

would seem that the difference must have been unfavorable to the experiments.

It is insisted by appellant that there is a variance between the allegations and the proofs, in that the declaration charges that "the bones of her body were broken," while the proofs show it was the bones of her limbs and arms. This contention is too refined for practical purposes. While some learned lexicographers define "body" as referring to the trunk of a man in distinction to his limbs, arms or head, still in the usual and common acceptance of the term, it means the whole person. The word "body," when used in criminal process, either to arrest or commit the body of a prisoner, refers to the whole physical man. An assault to do a bodily injury is committed by inflicting a serious injury on any part of the person, and may be committed on the arms, limbs or head, as well as the trunk of the body.

Many centuries ago, an inspired writer, who has ever been regarded by the christian world as one of its greatest scholars and thinkers, said "all the members of that one body, being many, are one body. * * * The body is not one member, but many." One definition of the word "body" in the Universal Dictionary of the English Language is, the human body, the whole man. We think there was no substantial variance between the declaration and the proofs.

The sixth, seventh and eighth points raised in appellant's brief have been considered, and we find nothing in either of them that would justify us in reversing the case.

It is insisted the court erred in giving the first and second instructions for appellee. The objection to these instructions is, that the negligence of appellant is not limited to the negligence charged in the declaration. Where specific acts of negligence are charged in the declaration, the right to recover is limited to the negligence charged, and it is not in such case a correct method to instruct that if the defendant is guilty of any negligence or negligence generally which resulted in the injury, the defendant would

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be liable. *C. & A. R. R. Co. v. Rayburn*, 153 Ill. 290; *West Chicago St. Ry. Co. v. Martin*, 154 Id. 523; *C., B. & Q. R. R. Co. v. Levy*, 160 Id. 385; *Camp Point Mfg. Co. v. Ballou*, 71 Id. 417; *West Chicago St. Ry. v. Musa*, 80 App. 223. Whether the giving of such an instruction is reversible error depends on its misleading tendencies under the circumstances of the case. In the case at bar, the jury were repeatedly told, in other instructions, that appellee could only recover upon proof of the acts of negligence charged in the declaration. Taking the whole series of instructions as one charge and reading them together, it is not perceived how any ordinary man could have been misled as to the negligent acts for which a recovery was authorized.

We are aware that in *Camp Point Mfg. Co. v. Ballou*, *supra*, and in *C., B. & Q. R. R. Co. v. Levy*, *supra*, it is held that the giving of such instruction is not cured by giving other instructions limiting the right of recovery to the negligence charged in the declaration; but in both of these cases, acts of negligence were before the jury which were not charged in the declaration, and it is pointed out that the jury might very reasonably have applied the instruction to such acts, and if so applied the instruction was misleading notwithstanding other instructions in the series laid down the rule with proper restrictions.

In the case at bar, proof of no acts of negligence was made that were not charged in some of the counts of the declaration. The instruction is carefully guarded in requiring the finding to be from the evidence. If the finding must be from the evidence, and there is no evidence of any act of negligence, except such as are in the declaration, how can it be said the jury may have been misled into basing a verdict on the negligence not charged in the declaration?

In *West Chicago St. Ry. Co. v. Musa*, *supra*, speaking of an instruction somewhat like those under consideration, the court says: "There is no reason to conclude that the jury could have found defendant guilty of negligence other than that charged in the declaration, when none was in

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any way brought to their notice at the trial." We are of the opinion that the error in giving the instructions in question is so far cured by others in the series, that it is not sufficient to justify a reversal of the case. See C. & E. I. Ry. Co v. Crose, 113 App. 547.

The court refused the seventeenth, eighteenth and nineteenth instructions asked by appellant, and this ruling is assigned as error. The seventeenth is as follows:

"If you believe from the evidence that the witness, Frank Lieb, threw the switch in question, and if you further believe from the evidence that the accident and injury would not have occurred except from the fact that the switch was so thrown, if so shown by the evidence, then plaintiff cannot recover, and your verdict should be for the defendant."

If this instruction states a correct rule of law, the court should have directed a verdict for appellant. The facts upon which it is predicated cannot be disputed from this record. The effect of this instruction is to withdraw from the jury all consideration of the alleged negligence of appellant.

If appellant was guilty of the negligence charged, and the jury believed such negligence was a concurring and efficient cause of the injury, the fact that the switch was wrongfully turned by an unauthorized person, thereby affording a condition of things which made the injury possible, is no defense to the action.

Instructions eighteen and nineteen both embody the same proposition in different words, contained in seventeen, and were properly refused for the same reasons. It is complained that the court erred in sending the declaration out to the jury without detaching the third and fourth counts, to which a demurrer had been sustained. There was nothing in these counts which was not contained in other counts which were held good and to which a plea had been filed. We fail to see how appellant could have been prejudiced by the action of the court in this regard. It is the established practice in this State to allow the jury to take all the pleadings to the jury room upon which issue is joined. E. Dubuque v. Burhyte, 74 App. 102; 2 Thomp-

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son on Trials, sec. 2583. But this rule does not authorize the court to allow counts which have been eliminated by demurrer or otherwise to go to the jury. *City of Elgin v. Thompson*, 98 App. 358. Where, however, as is the case here, the counts to which a demurrer has been sustained are substantial repetitions of other counts which remain, allowing such eliminated counts to go to the jury is harmless error and does not, in any manner, prejudice the rights of appellant.

We do not regard the damages awarded by the jury as excessive, under the evidence. Other assignments of error, which have been discussed by counsel, have received our careful consideration; but having reached the conclusion that there is no error in this record for which the judgment should be reversed, a discussion of these other assignments would make this opinion longer without any corresponding compensation to the parties.

The judgment is affirmed.

Affirmed.

CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURT OF ILLINOIS
DURING THE YEAR 1905.

James Coleman, et al., v. Jennie Swick.

Gen. No. 11,799.

1. **ADOPTED CHILD—*heirs of.*** The adopted parents and their heirs are not the heirs of their adopted child.

2. **ADOPTED CHILD—*who not entitled to inherit from illegitimate child of.*** Where an adopted child has received property from its adopted parents and dies, leaving an illegitimate child as the heir of such property, and such illegitimate child dies, leaving no child nor descendant of a child, nor any parent, nor brother, nor sister, nor any descendant of such, nor any surviving husband, the natural heirs of such adopted child take nothing.

Contest in court of probate. Appeal from the Circuit Court of Cook County; the Hon. JULIAN W. MACK, Judge, presiding. Heard in this court at the March term, 1904. Reversed. Opinion filed March 13, 1905.

Statement by the Court. This is an appeal from a judgment of the Circuit Court, rendered on appeal from the Probate Court. The bill of exceptions recites that proof was made of the following facts:

First. Nellie German, the decedent, was born on or about January 18, 1878, and was the illegitimate child of the claimant, Jennie Swick, whose name at that time was Jane Evans. At the March term, 1880, of the County Court of Knox County, Illinois, by an order duly entered by said County Court of Knox County, Illinois, the said

Nellie German was legally adopted by Betsey E. German and her husband, John E. German, the said mother, Jane Evans, as a part of said procedure having filed her written consent to said adoption.

Second. That said Betsey E. German, the mother of said Nellie German by adoption, died intestate on or about the 30th day of March, 1889, without issue or descendants of such, but leaving her husband, said John E. German, and her adopted daughter, Nellie German, her surviving.

Third. The said John E. German, father of said Nellie German by adoption, afterwards on or about the 24th day of November, 1892, died intestate, leaving him surviving said Nellie German, his daughter by adoption, Lulu N. German, his second wife, his widow, and Maude S. German and John E. German, Jr., children by said second marriage, his only heirs at law or descendants of such.

Fourth. Afterwards and on or about the 30th day of June, 1898, the said Nellie German died intestate, leaving Myrtle J. German, her illegitimate child, her only heir at law or descendant of such, her surviving. Said Myrtle J. German died intestate on or about the 22d day of September, 1898, being less than four months of age, and leaving her surviving neither child or descendants of any child, and no parent, brother or sister, or descendant of any parent, brother or sister, and no husband surviving. On August 17, 1898, one Myron W. Whittemore was appointed administrator of the estate of said Nellie German, deceased, by the Probate Court of Cook County, and on June 5, 1900, one Arthur W. Fulton was appointed administrator of the estate of the said Myrtle J. German, deceased, by the same court, and both of said administrators are still acting as such and both of said estates remain unclosed.

Fifth. The only heirs at law of said Betsey E. German living at the time of the death of the said Myrtle J. German, were James Coleman, Nathaniel Coleman, William Coleman, Isabel Pilgrim and Margaret R. Addis, who were brothers and sisters respectively of the said Betsey E. German, and all of whom are still living.

The only heirs at law of the said John E. German living at the time of the death of said Myrtle J. German, were Maude S. German and John E. German, Jr., his children by the second marriage, and both of whom are still living.

Sixth. At the time of her death the said Betsey E. German was seized and possessed of certain real estate located in Knox County, Illinois, and which she had derived by conveyances from her mother. Said real estate on the death of said Betsey E. German passed by descent to her adopted daughter, the said Nellie German, subject to the homestead and dower rights of the said John E. German, and which homestead and dower rights terminated upon the death of said John E. German, as aforesaid.

After the death of both John E. German and Betsey E. German and shortly before her own death, the said Nellie German caused said real estate to be sold and the proceeds thereof, amounting to about \$8,000, were, after her death, turned over to her said administrator and constituted the sole assets of her estate. The only property owned by the said Myrtle J. German, or to which she was entitled, at the time of her death, was her undistributed share of the estate of Nellie German, her mother, which estate, as above stated, consisted exclusively of proceeds of property inherited by the said Nellie German from Betsey E. German, her mother by adoption.

The distributive share of the said Myrtle J. German in the estate of her mother, the said Nellie German, had not been paid over or come to the possession of the said Myrtle J. German during her lifetime nor to her administrator since her death, but still remains undistributed in the hands of the administrator of the estate of Nellie German, deceased, and for the purpose of saving any unnecessary expense, it was agreed by all the parties herein that the share of the said Myrtle J. German in the estate of said Nellie German should be paid by the administrator of said estate of Nellie German, deceased, direct to the persons who are finally determined to be entitled thereto after paying all just claims allowed against the estate of said Myrtle J. German and

costs of administration therein due, instead of turning the same over to the administrator of the estate of said Myrtle J. German, deceased, for distribution by him.

The cause was heard in the Circuit Court by the court without a jury, by agreement of the parties, and the court held that appellee is entitled to inherit all of the property of which Myrtle J. German died seized or possessed, in the hands of the administrator of the estate of Nellie German, and ordered accordingly.

The Probate Court, on the contrary, found and ordered as follows :

"That Jennie Swick is not entitled to inherit from Nellie German or Myrtle J. German the property described in the inventory in this estate, said property having been inherited by said Nellie German from and through Betsey E. German, the adopted mother of said Nellie German, and by Myrtle J. German from her mother, Nellie German.

That said property, under the statute, descends to and should be distributed among the heirs of said Betsey E. and John E. German, parents by adoption.

That the heirs of Betsey E. and John E. German alive at the time of the death of Myrtle J. German and still surviving her are as follows : James Coleman, Isabel Pilgrim, Nathaniel Coleman, William Coleman and Margaret R. Addis, brothers and sisters of said Betsey E. German, each of whom inherits and is entitled, upon the distribution of said estate, to one-tenth of the proceeds of such estate; and that Maude S. German and John E. German, the children of John E. German, deceased, by his second wife, inherit and are entitled, upon distribution, to one-fourth each of the proceeds of said estate.

It was therefore ordered that the administrator of the Nellie German estate, after paying the just claims against said estate, and the costs of administration thereof, and after paying the just claims allowed by the court against the Myrtle J. German estate, and the costs of administration thereof incurred at the present time, shall, thereupon, upon approval of the final report of said administrator, distribute the proceeds of the said Nellie German estate in the manner as above related, and that upon the making of such distribution, said administrator shall be discharged, said estate declared closed, and the administrator of the Myrtle J. German estate discharged and that estate declared closed."

WILLIAMS, LAWRENCE & WELSH and ALVAH S. GREEN, for appellants; ASHCRAFT & ASHCRAFT, of counsel.

EUGENE CLIFFORD and WILLIAM W. FULLER, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

In discussing the question before us, sections 4, 5 and 6 of chapter 4 of the Revised Statutes, in regard to the adoption of children, and chapter 39 of the Statutes, in regard to the descent of property, are to be considered. Sections 5 and 6 are as follows :

Sec. 5. "A child so adopted shall be deemed, for the purposes of inheritance by such child, and his descendants and husband or wife, and other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation."

Section 6. "The parents by adoption and their heirs shall take by descent, from any child adopted under this or any other law of this State for the adoption of children, and the descendants, and husband and wife, of such child, only such property as he has taken or may hereafter take from or through the adopting parents, or either of them, either by gift, bequest, devise or descent, with the accumulations, income and profits thereof; and all laws of descent and rules of inheritance shall apply to and govern the descent of any such property, the same as if the child were the natural child of such parents; but the parents by adoption and their heirs shall not inherit any property which such child may take or have taken, by gift, bequest, devise or descent, from his kindred by blood." Hurd's Rev. Stat. 1903, p. 128.

By section 5 the legal status of a child of the adopting parents, born in lawful wedlock, is given to the adopted child, except that such child is excluded from inheriting certain property described in the last part of the section. Considering section 5 alone, it might well be inferred that the adopting parents might be heirs of the child. To say the least this might plausibly be claimed under section 5.

Also, section 4 of the Adoption Act provides that the decree of adoption shall order that, from its date, "the child shall, to all legal intents and purposes, be the child of the petitioner."

By the statute in regard to the descent of property, the heirs of the child, or his descendants, would take all his property of every kind, from whatever source derived. But by section 6, the right of the adopting parents and their heirs, when heirs of the child, is limited as to the property which they may take, namely: "Only such property as he has taken, or may hereafter take from or through the adopting parents, or either of them, either by gift, bequest, devise, or descent, with the accumulations, income and profits thereof;" and out of abundant caution, as it would seem, the section concludes with this language: "But the parents by adoption and their heirs shall not inherit any property which such child may take or have taken, by gift, bequest, devise or descent from his kindred by blood." Section 6 does not constitute the adopting parents, or their heirs, the heirs of the child. It only applies when such adopting parents, or their heirs, as the case may be, are, by the statute in regard to the descent of property, the heirs of their adopted child or his or her descendant, or husband or wife. Section 6 does not change the law of descent. On the contrary, it expressly provides: "And all laws of descent and rules of inheritance shall apply to and govern the descent of any such property, the same as if the child were the natural child of such parents." If the adopting parents, or their heirs, are, by the statute of descents, the heirs of the adopted child, or its descendant, they take as prescribed by section 6. This is illustrated in the present case. On the death of Nellie, the adopted child, Myrtle, her daughter and, by virtue of the statute of descents, her heir, took the property in question, and the heirs of the adopting parents, who were not, by the statute, Nellie's heirs, took nothing. So that the question of the heirship of the child, or its descendants, or husband or wife, as the case may be, is to be determined by reference to the statute in regard to the

descent of property. In the present case, Myrtle German, the daughter of Nellie German, who was the adopted child of John E. and Betsey E. German, inherited the property which came to her mother, Nellie, from Betsey E. German, and, regarding the status of Nellie E. German as that of a natural child of John E. and Betsey E. German, the specific question is, who are the heirs, by the Statute of Descent, of Myrtle J. German. Myrtle J. German died heir to no property, except that derived directly from her mother, Nellie German, and neither seized nor possessed of any other property. She was less than four months old when she died intestate. She left no child nor descendant of child, nor any parent nor brother nor sister, nor any descendant of such, nor any surviving husband. In such case, the fifth clause of section 1 of chapter 29 of the statutes in regard to the descent of property, provides: "Such estate shall descend in equal parts to the next of kin to the intestate in equal degree, computing by the rules of the civil law, and there shall be no representation among collaterals, except with the descendants or brothers and sisters of the intestate; and in no case shall there be any distinction between the kindred of the whole and the half blood." There is no contest between appellants as to whether the property should be distributed otherwise than in accordance with the order of the Probate Court. In their argument in chief, counsel for the appellants say: "The interests of one set of appellants in this case naturally lead to the wish that the property in controversy might go back in entirety to the heirs (the brothers and sisters) of Betsey German, since this was her absolute property which came from her to Myrtle German; the interests of the other set that it might go in its entirety to the children of John German by his second wife. But the language of the statute indicates so plainly that the heirs of both the adoptive parents shall take the property which has come from them or either of them, that we are all driven to the opinion that both the children of John German by his second wife, and the brothers and sisters of Betsey German, who are the heirs

of the parents by adoption, should take by descent the property which came to Myrtle German from Betsey German, one of the parents by adoption."

In their reply argument counsel say: "The property in this case came from one of the adoptive parents to the descendants of the adopted child. It should go back to the heirs of the adoptive parents, in accordance with the provisions of section 6. Judge Cutting of the Probate Court so held, and he held that the words 'heirs of the parents by adoption' meant heirs of both parents, and that the property should be distributed, one-half to the heirs of John German and one-half to the heirs of Betsey German. We maintain that his decision was just and right, and that decision we ask this honorable court to approve."

There being no contest between appellants, we are not called on to express any opinion as to whether or not the property in question should be distributed, as between appellants, otherwise than as ordered by the Probate Court. If the appellee is excluded from taking, it is immaterial to her to whom the property shall be distributed.

Counsel for appellee contend that the natural kindred of an adopted child are not barred by section 6 from inheriting from the child, or his heir, property derived from or through the parents by adoption. Regarding the adopted child as the natural child of its parents by adoption, we have shown that were it not for the limitation in section 6 of the Adoption Act, the heirs of the adopted child or of the intestate child of such child would take, under the Statute of Descents, all the property of the intestate, and that the limitation in section 6 merely eliminates from the entire property which they would so take, property which the intestate may have taken by gift, bequest, devise or descent from his kindred by blood. We think this a sufficient answer to the contention.

Counsel further contend that Nellie German not having preserved in kind the real property which she inherited from her mother by adoption, Betsey E. German, but having sold the same and converted it into money, which

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money was inherited by Myrtle J. German, Nellie's daughter, section 6 of the Adoption Act does not apply. We think this too narrow a view, and contrary to the spirit of the Adoption Act. Section 6 includes not only the property in kind which may have been derived from the parents by adoption, but also the accumulations, income and profits thereof; so that its provisions are not confined to the very property which the child may have taken from its parents by adoption. If the accumulations, income and profits of the property originally taken from the adopted parents, no part of which accumulations, income and profits was so taken, are within the statute, we cannot perceive why money, the proceeds of the sale of property taken from such parents, should not also be held to be within the statute.

Our conclusion being that the appellee took nothing, as heir of Myrtle J. German, deceased, the judgment of the Circuit Court will be reversed.

Reversed.

George F. Harding, et al., v. Adelaide M. Harding.

Gen. No. 12,180.

1. *ALIMONY—power of court to enforce decree for.* A court of chancery granting a decree for alimony has ample power to enforce that decree when enforcement is possible; and this, by the appointment of a receiver in a proper case, and likewise, if expedient, by injunction, either through a petition filed in the same suit or by separate bill filed in the court which granted the decree. The proceeding by separate bill is peculiarly appropriate where it is essential to join new parties.

2. *APPLICATION OF PAYMENTS—how made.* When a debtor makes a payment without specifying on what debt it was to be applied, the creditor has a right to select the debt on which he will give the credit.

3. *CREDITOR'S BILL—what not.* A proceeding to enforce a decree for alimony is not a creditor's bill in a technical sense and the exhaustion of the legal remedy need not be shown as a prerequisite to relief.

Appeal from interlocutory order of injunction. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed March 13, 1905. Rehearing denied March 27, 1905.

Statement by the Court. This is an appeal from an interlocutory order of injunction granted on a bill filed by appellee against George F. Harding, Abner C. Harding, George F. Harding, Jr., Gregory T. Van Meter, Chicago Real Estate, Loan & Trust Company, First National Bank of Chicago, National Safe Deposit Company, John L. Czewek, the Glucose Sugar Refining Company, the Corn Products Company, John S. Miller and Merritt Starr.

The following facts, in substance, are averred in the bill: July 26, 1897, the Circuit Court of Cook County, in a cause in which appellee was complainant and George F. Harding, defendant, entered a decree that said George F. Harding should pay to said complainant \$6,400 per annum, payable in equal monthly installments until further order, as and for her separate maintenance; and should also, within twenty days from the entry of said decree, pay to said complainant \$8,156.61, as and for the separate maintenance of the daughters of said complainant and George F. Harding, and should also, within said time, pay to said complainant the further sum of \$996.47, paid out or incurred by her in the prosecution of her said suit; also, that said George F. Harding should pay to said complainant, or her solicitors, within said twenty days, the further sum of \$8,000.

On appeal to the Appellate Court for the First District said decree was modified, by reducing said sum of \$6,400 to \$3,600 per annum, to be paid in monthly installments of \$300 each, and the decree was, in all other respects, affirmed. December 8, 1899, the Circuit Court entered an order modifying its decree of July 26, 1897, to correspond with said judgment or decree of the Appellate Court. Complainant caused a transcript of said decree, so modified, to be filed in the offices of the clerks of the Circuit Courts of Winnebago, McDonough, Henderson, Mercer and Warren Counties, in this State.

May 27, 1900, none of said sums decreed to be paid as aforesaid, nor any part thereof, having been paid, and there remaining unpaid, including interest, \$30,497.39, complainant caused to be issued and delivered to the sheriff of Cook

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County an execution, which, September 20, 1900, said sheriff returned no property found and no part satisfied. June 22, 1900, complainant caused execution to be issued and delivered to the sheriff of Winnebago County, which, September, 20, 1900, said sheriff returned no property found and no part satisfied. Also, June 22, 1900, complainant caused to be issued and delivered to each of the sheriffs of McDonough, Henderson and Mercer Counties an execution, which executions were returned by said sheriffs, respectively, no part satisfied. Also, June 22, 1900, complainant caused to be issued and delivered to the sheriff of Warren County a like execution, which said sheriff levied on certain real property of George F. Harding in said county, and offered the same for sale and received only one bid therefor, namely, \$15.75, for which sum said real property was sold, and said sum applied in payment of costs, and said sheriff returned said execution, no part satisfied.

Since May 27, 1900, George F. Harding has paid to complainant small sums at different times, the total of which is in excess of \$300 per month since said date, and said George F. Harding not having directed how said payments should be applied, complainant applied them on the current sums due her, and not on the amount due her on May 27, 1900, except the excess aforesaid, which complainant applied on the amount due her May 27, 1900, and which said excess so applied reduces the amount due complainant to \$29,272.98.

December 12, 1901, it was adjudged and decreed that George F. Harding pay to complainant, or to her solicitors, John S. Miller and Merritt Starr, \$5,000, as solicitors' fees, and \$166.28 for disbursements since July 26, 1897, no part of which sums has been paid; and February 8, 1904, complainant assigned to said Miller and Starr the said sums and also the sum of \$8,000 decreed to be paid to complainant or her solicitors, by the decree of July 26, 1897. June 10, 1896, George F. Harding, for the expressed consideration of \$5,000, quit-claimed to the Chicago Real Estate Loan & Trust Co., defendant, all lands and lots owned by him in the State of Illinois, which conveyance was, July 2,

1896, recorded in the recorder's office in Cook County, Illinois, but not elsewhere in said State. Said Chicago Real Estate, Loan & Trust Co. is an Illinois corporation, the original name of which was Peoria Starch Manufacturing Co., which name was subsequently changed to the Chicago Real Estate, Loan & Trust Co. It is pretended that George F. Harding owns only one share of the stock of said corporation, and that George F. Harding, Jr., is the owner of a majority of said stock, and that he purchased the same from George F. Harding, the former owner thereof; but complainant is informed, believes and charges the fact to be that the ownership of said stock by George F. Harding, Jr., is only colorable and for the purpose of defrauding complainant and other creditors; that the said stock really belongs to George F. Harding, and that he manages and controls said corporation through the defendant George F. Harding, Jr., and conceals the affairs of said corporation by frequent changes of its officers and directors, who, in most instances, are clerks or employes of George F. Harding, Jr., and mere dummies to carry out the directions of said George F. Harding, given by himself or George F. Harding, Jr. At the time of the execution of said conveyance by George F. Harding to the Chicago Real Estate, Loan & Trust Co., George F. Harding was the owner of the following described property, situated in the State of Illinois and other States: (Here follows a long list of lots and lands.) Although the title to most or all of said real property is in the name of the Chicago Real Estate, Loan & Trust Company, George F. Harding is the actual and beneficial owner thereof. All of said property is encumbered by mortgages, real or pretended. Nearly all of said real property in Cook County is improved and is producing a large income, and the farming lands and town and city lots, in counties other than Cook, are, in most instances, improved and produce, in the aggregate, a large income. George F. Harding has failed to keep said improved property in good repair and condition, and has allowed the same to run down and deteriorate, whereby the rents have

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become reduced, etc., for the purpose, as complainant has been informed and believes, of defrauding her, and preventing the collection of the money due her. The interest on most of said mortgages has not been paid and much of the same is in arrears, and, in large portions of said property, the taxes have not been paid, and the property has been sold for taxes, and unless a receiver shall be appointed, said property is in danger of being lost. The Peoria Starch Manufacturing Co., the name of which was changed, as aforesaid, being under the control of George F. Harding, by reason of his ownership of most of its stock, sold all its property to the American Glucose Co. for 2,035 shares of the stock of said Glucose Company, of the par value of \$100 per share. Subsequently the capital stock of said American Glucose Company was so reduced that the shares of George F. Harding were reduced to 203.5, of the par value of \$100 each. In 1897 a number of corporations engaged in the manufacture of glucose and the products of corn, including the American Glucose Co., formed the scheme of creating a great combination or trust, whereupon George F. Harding and the Chicago Real Estate, Loan & Trust Co. filed a bill in the Circuit Court of Peoria County against said American Glucose Co., its officers, directors and stockholders, averring that said George F. Harding was the owner of 203.5 shares of the capital stock of said American Glucose Co., subject to the rights of the Chicago Real Estate, Loan & Trust Co., and that said proposed combination or trust was unlawful, as being in restraint of trade and for the purpose of creating a monopoly. The Circuit Court of Peoria County dismissed the bill for want of equity, but the Supreme Court, on writ of error, reversed the decree of said Circuit Court, and held that said proposed combination or trust was void, and directed said Circuit Court to enter a decree setting aside the deed of the American Glucose Co. conveying its plant, etc., and, thereupon, the promoters of said combination or trust, in order to eliminate the opposition of George F. Harding, and consummate said combination, delivered to George F.

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Harding 5,000 shares of the capital stock of the Glucose Sugar Refining Co., of the par and market value of \$100 each, in exchange for the said 203.5 shares of stock of the American Glucose Co. Defendants pretend that said 5,000 shares were received by George F. Harding for the Chicago Real Estate, Loan & Trust Co., but complainant charges that they are the property of George F. Harding, and that such pretensions are merely for the purpose of defrauding complainant. The defendant John L. Czewek, an employe of George F. Harding or George F. Harding, Jr., and who is under their domination and control, was, at or soon after the receipt by George F. Harding of said 5,000 shares, the secretary of the Chicago Real Estate, Loan & Trust Co., and pretended to have the custody of the certificates of said shares, but said certificates were deposited in the safety deposit vaults of the National Safety Deposit Co., in a box rented, or caused to be rented, by George F. Harding, Jr., in whose name complainant is not advised, the key of said box to be retained by George F. Harding, Jr., so that said certificates were wholly under his control. Complainant is informed and believes that George F. Harding and George F. Harding, Jr., have caused said shares, or some of them, to be exchanged for the shares of stock of other corporations, and have caused the certificates of shares so received in exchange to be deposited with the National Safety Deposit Co., and have also pledged with the defendant the First National Bank of Chicago, certain certificates of shares of the stock of the Glucose Sugar Refining Co. as security for certain loans made by said defendant bank to George F. Harding, George F. Harding, Jr., or the Chicago Real Estate, Loan & Trust Co.; but said George F. Harding is the beneficial owner of said shares of stock, subject to any equities of said bank, and the possession and control thereof by said George F. Harding, Jr., and John L. Czewek are an attempted fraud on the rights of complainant. Then follow general averments such as are usual in an ordinary creditor's bill; also, charges of conspiracy of the defendants George F. Harding, George F. Harding, Jr.,

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Abner C. Harding, Gregory T. VanMeter and John L. Czweck, to conceal and cover up George F. Harding's property, for the purpose of defrauding complainant and preventing her from collecting the moneys due her.

The bill avers reasons why an injunction should be granted without notice, prays that some of the defendants, naming them, may answer under oath, and that others, naming them, may answer, without oath, certain interrogatories to be answered by defendants named, prays for an injunction and the appointment of a receiver, and for general relief. The court, on recommendation of a master, ordered a temporary injunction to issue, as prayed. The bill is sworn to.

WILLIAM H. BARNUM, for appellants.

PLINY B. SMITH, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

The interlocutory or preliminary injunction having been granted solely on the verified bill, the foregoing statement of the contents of the bill is necessary to an understanding of the case. The contention of appellants' counsel is, that the bill is merely a creditor's bill and must be regarded as exclusively such, and that, considered as a creditor's bill, it is bad in not showing that the complainant has exhausted her legal remedies. While many and perhaps most of the averments of the bill are such as would be appropriate in a creditor's bill, yet they tend to show the impracticability, if not impossibility, of complainant collecting the alimony decreed to be paid to her, without the aid of the court, and, therefore, are pertinent if the bill is to be regarded as a bill to enforce the alimony decree, as contended by appellee's counsel. But counsel for appellant says that the bill cannot be sustained as a bill to enforce the decree, for the reason that an application for enforcement of a decree for alimony must be made to the court which entered the decree, and that the bill was not filed in the court which entered the alimony decree. We concur in the proposition

that an application to enforce a decree for alimony must be made to the court which granted the decree; but not in the contention that the present bill was not filed in the court which granted the decree. The contrary appears from the bill itself, to which alone we can look. The bill was filed in the Circuit Court, as the record shows, and it is expressly averred in it: "That, on the 26th day of July, 1897, *this* court, in a certain cause then pending in *this* court, wherein your oratrix was complainant and the said George F. Harding was defendant, entered a decree wherein and whereby it was ordered, adjudged and decreed that the said George F. Harding should pay to your oratrix," etc. Then follows a statement of the original decree, the appeal to this court, the modification of the decree, etc., as shown in the statement preceding this opinion. Thus it appears from the record before us, that the present bill was filed in the same court which granted the alimony decree. Even though it should be erroneously contended that the application for enforcement of the decree should be made before the judge who presided in the court when the decree was rendered, the record would not support the contention, as it is silent in that regard. We cannot presume, however, that the learned counsel for appellant would so contend. That the court granting a decree for alimony has ample power to enforce the decree, when enforcement is possible, there can be no question. Hurd's Rev. Stat. 1903, C. 22, sections 42 and 47; *Blake v. The People*, 80 Ill. 11; *Wightman v. Wightman*, 45 Ib. 167; *Becker v. Becker*, 15 Ill. App. 247; *Bishop on Marriage, Divorce, etc.*, parag. 1089, *et sequens*.

In *Wightman v. Wightman*, *supra*, the court say: "We have no doubt a court of chancery has power, in addition to making a decree for alimony a lien on the lands of the defendant, which it would be without a decree to that effect, to enforce the decree by attachment for contempt, and if the defendant remains contumacious, defying the court, may also sequester his estate."

In *Blake v. The People*, *supra*, it is said: "It is ap-

prehended that decrees for alimony may be enforced by execution or other final process, as other decrees in chancery, or any other mode consistent with the practice in the courts of chancery; but, as cumulative remedies, no doubt, the court may enforce decrees for alimony 'either by sequestration of real or personal estate, by attachment against the person, by fine or imprisonment, or both, in the discretion of the court,' as other decrees in chancery may be enforced."

The court may appoint a receiver in a proper case, and, in the meantime, may enjoin alienation of the defendant's property, until fully advised as to whether a receiver should be appointed. *Carey v. Carey*, 2 Daly (N. Y.), 424. Even pending a bill for divorce, or separate maintenance, the husband may be enjoined from alienating his property. *Springfield M. & F. Ins. Co. v. Peck*, 102 Ill. 265, 269. *A fortiori*, this is true when alimony has been decreed.

It is usual to proceed by petition, in the same suit, when the aid of the court to enforce a decree for alimony is sought; but we perceive no objection to proceeding by bill, especially when necessary to bring in new parties, as in the present case, and we think the bill in question may well be considered as incidental or supplemental to the bill for separate maintenance, or at least as a petition in the separate maintenance suit.

Appellants' counsel contend that complainant was legally bound to apply all payments made by defendant George F. Harding since May 27, 1900, on the arrearages of alimony due prior to and at that date. "The law is well settled that when a debtor makes a payment without specifying on what debt it shall be applied, the creditor has a right to select the debt on which he will give the credit." *McFarland v. Lewis*, 2 Scam. 345; *Hare v. Stegall*, 60 Ill. 380; *Wilhelm v. Schmidt*, 84 Ib. 183.

The bill avers that the defendant George F. Harding, gave no direction as to how the payments made should be applied, and that complainant applied them to the monthly installments of alimony accruing due after May 27, 1900, which she had a right to do. The defendant the First

National Bank of Chicago, is enjoined "from permitting said defendants to withdraw or remove from your custody any money or other valuable thing, or things, on deposit with you, or held by you to the credit of the said defendants, or any of them." In regard to this part of the injunction, counsel for appellants say: "The effect on the bank is to drive off and keep away its customers, since none of the other appellants is very likely to put any more of his money, stocks and securities into its keeping, subject to the operation of the injunction." The bill refers to nothing deposited with the First National Bank except shares of stock, and we do not think the injunction can be construed, so far as the bank is concerned, as applying to anything else. If any of the defendants to the bill has an account with the bank, or money deposited in it to his personal credit, which money belongs to such defendant, and in which the defendant George F. Harding has no interest, the Circuit Court will, without doubt, on proper showing, modify the injunction as to such defendant. In view of the facts stated in the bill and the legal principles applicable thereto, we are of opinion that the court did not err in granting the injunction.

Inasmuch as we think the bill maintainable as a bill or petition for the enforcement of the alimony decree, it is unnecessary to express any opinion as to whether it can be maintained as a creditor's bill.

The order granting the injunction will be affirmed.

Affirmed.

Peter J. Joyce v. City of Chicago, et al.

Gen. No. 11,806.

1. CIVIL SERVICE COMMISSION—*effect given to record of.* The record of proceedings had before the Civil Service Commission as finally returned, imports absolute verity and is taken as conclusive.

2. CIVIL SERVICE COMMISSION—*how far decision of, reviewed.* Where the finding and judgment of a Civil Service Commission is

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sought to be reviewed, the only questions which may be considered are, did the Civil Service Commission have jurisdiction of the cause and did it follow the form of proceedings legally applicable in such cases?

3. CLASSIFIED SERVICE—*what sufficient cause for removal from.* Making a false official return, that is to say, the turning in of an expense account in excess of the amount actually expended, is sufficient cause for the discharge of a police officer from the classified civil service.

4. WRITTEN CHARGES—*what accuracy not required of, under Civil Service Act.* The charges and specifications made against a police officer under the Civil Service Act need not have the accuracy of an indictment. Their object is simply to apprise the officer or employe accused with reasonable certainty of the charges against him, so that he may have a fair opportunity to defend himself.

Certiorari proceeding. Appeal from the Circuit Court of Cook County; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed March 13, 1905.

Statement by the Court. This is an appeal from the Circuit Court of Cook County seeking to reverse a judgment of that court quashing a writ of *certiorari* previously issued by it on the petition of the appellant, Peter J. Joyce, and directed to the Civil Service Commissioners of the City of Chicago.

The petition on which the writ was issued set forth, as its material allegations, that the petitioner, Joyce, had been a member of the police department of Chicago for eighteen years, and was then lieutenant of police; that on August 17, 1901, the superintendent of police filed written charges against him with the Civil Service Commissioners, charging him with "making a false official report, and conduct unbecoming a police officer in violation of rules 27 and 67, respectively, of the Book of Rules and Regulations governing the department of police;" that the specifications filed with said charges showed that each act charged was done, if at all, as a notary public for Cook County, and not as a police officer; that he appeared before said Civil Service Commission and raised the question of the jurisdiction of said tribunal to try him for acts alleged to have been done as a notary public; that the Civil Service Commissioners

on August 31, 1901, found him guilty as charged, and recommended to the superintendent of police and the mayor his dismissal from the police service; that in entertaining said charges and specifications, in sitting in said trial, in hearing the evidence, and in finding the petitioner guilty, the commissioners exceeded their lawful jurisdiction, and that the petitioner has no remedy and no way to have said finding and recommendation set aside or reversed except by writ of *certiorari*.

The writ was issued on this petition. The commissioners made return thereto, which was filed in the Circuit Court September 21, 1903. The return showed the examination of the petitioner, Joyce, for promotion to the rank of lieutenant of police by the Civil Service Commission, his certification for appointment to that position by the Commission, and the report of his promotion to that office filed with the Commission by the appointing officer. It further showed that certain written charges with specifications in writing were filed against the petitioner in the office of the Civil Service Commission by the general superintendent of police, and set out the charge and specification in full, as follows:

“Charge: Making a false official report and conduct unbecoming a police officer, in violation of rules 27 and 67, respectively, of the Book of Rules and Regulations governing the Department of Police.

“Specification: On June 6, 1901, Lieutenant Peter J. Joyce, of the Detective Bureau, wrote out for Patrolman John J. Tracy of his command, a Messenger's Expense Account for the return of Joseph Larkin, a fugitive from justice, from Cleveland, Ohio, to this city.

“Lieutenant Joyce discussed the illegality of the claim made in said expense account with Officer Tracy, which amounted to \$75.80, this amount being \$48.40 in excess of the actual expenses, and notwithstanding the scruples of Officer Tracy, Lieutenant Joyce filled out the blank known as ‘Messenger's Expense Account,’ including form of affidavit, and affixed thereto the notarial seal, without requir-

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ing Officer Tracy to swear to the truth of the statements made in connection with said Messenger's Expense Account.

"Said Messenger's Expense Account, together with necessary correspondence, was forwarded to the Secretary of State by Lieutenant Joyce, who instructed Officer Tracy in everything connected with said Expense Account, and added: 'This is a kind of dangerous affair, but it is done repeatedly. Your check will come later, and you can come in and see me, and I will tell you what to do with it.'

"On receipt of the draft for \$75.80, claimed in Expense Account, from the Secretary of State, Officer Tracy turned it over to his partner, Sergeant Cramer, to be disposed of. In the distribution Lieutenant Joyce is said to have gratefully received from Detective Sergeant Cramer \$5 for his share in the transaction."

It further showed that a hearing was had in August, 1901, on said charges, before the Commission; that the petitioner was present and was represented by counsel; that numerous witnesses were heard under oath; that on August 31, 1901, a finding and decision was made by said Commission, finding the charges and specifications proved, and deciding that said Joyce should be removed from his position as lieutenant, and from said department of police, and ordering the general superintendent of police to enforce the findings and decision. March 10, 1904, the matter came on to be heard before the Circuit Court, and it was ordered that the writ of *certiorari* should be quashed.

In this court it is assigned as error in the action of the Circuit Court that it quashed the writ when it should have quashed the proceedings of the Civil Service Commission, as prayed in the petition; that it rejected proper evidence offered by appellant, and did not take judicial notice of the records and files of the Criminal Court of Cook County.

A bill of exceptions was signed and allowed by the trial judge in the Superior Court, by which it appears that the court received in evidence when offered by the petitioner, certain rules and regulations of the police department as published in a book produced in court, and certain ordi-

nances published in volume 1 of the Revised Code of Chicago, also produced in court, and a rule made by the Civil Service Commission of Chicago, concerning a police officer's absence from duty and the penalty therefor, contained in an annual report of said Commission produced, and that the court refused to receive in evidence when so offered by the petitioner certain files of the Criminal Court of Cook County, purporting to be an indictment, record of verdict and judgment in the case of The People of the State of Illinois v. Joyce, and which counsel for petitioner asserted to be "an indictment for the same alleged offense and acts complained of before the Civil Service Commission, a verdict of not guilty, and a judgment of acquittal and discharge."

A. D. GASH and JAMES H. HOOPER, for appellant.

COLIN C. H. FYFFE, for appellee; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

MR. JUSTICE BROWN delivered the opinion of the court.

The bill of exceptions in this cause is an anomaly. The trial on a common-law writ of *certiorari*, such as is the writ involved here, must be solely on inspection of the record returned. The only questions which the Circuit Court could properly ask, were: Did the Civil Service Commission have jurisdiction in this case? And, did it follow the form of proceedings legally applicable in such cases? And these it should determine from the record itself; evidence *de hors* the record could not be properly introduced by either party. If the return in *certiorari* is not complete, there are methods of compelling its completion, which the court issuing the writ will adopt on proper motion of the party aggrieved. But the record as finally returned imports absolute verity, and is taken as conclusive. Blair v. Sennott, 134 Ill. 78; Smith v. Commissioners of Highways, 150 Ill. 385-391; Drainage Commissioners v. Volke, 163 Ill., 243; People ex rel., etc., v. Lind-

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blom, 182 Ill. 241; Heaney v. City of Chicago, 117 Ill. App. 405.

The Circuit Court had nothing to do with the justice of the finding which the Civil Service Commission made against appellant, nor whether it erred in its decision on the facts, or in its application of the law to those facts, nor have we.

This renders unnecessary any further allusion to the evidence rejected by the Circuit Court, and equally any allusion to that which was received and appears in the bill of exceptions. The latter neither helps nor hinders the appellant.

By the return it appears that the petitioner was in the classified Civil Service of Chicago. It appears that a charge was made against him by the superintendent of police of making a false official report, and of conduct unbecoming a police officer. It appears also that the appellant had due notice of this, and appeared personally and by counsel before the Commission, and had a full hearing; that the Commission found him guilty of the charges preferred and ordered him to be dismissed from the service by the proper officer. We see nowhere any justification for a finding that the Civil Service Commission exceeded its jurisdiction, or that it did not follow the form of proceedings legally applicable.

Before the Civil Service Law was enacted, a police officer of the city of Chicago was subject to arbitrary discharge by the mayor, although such removal must be reported to the council.

The Civil Service Act to prevent removal for political reasons, provided that no person in the classified service could be removed from his office or employment, "except for cause upon written charges, and after an opportunity to be heard in his own defense." This implies, of course, that the written charges must state a "cause" for removal and that this cause must be some substantial shortcoming, which renders his continuance in his office or employment in some way detrimental to the discipline or efficiency of

the service. But, as we said in *Heaney v. Chicago*, *supra*, when that is conceded a wide latitude is given to the Commission as to what will justify the separation from the service, provided only, the accused has been given the proper opportunity to know the nature of the charges and to be heard in his own defense.

To argue that no cause for such separation is sufficient unless it is shown to have been set down in some book of "Rules and Regulations," or some code adopted by the Civil Service Commission itself, or to say that "making a false official return," and "conduct unbecoming a police officer," are not sufficient causes, seems to us frivolous. If this construction were to be given the Civil Service Act, and contentions of this sort upheld, the act would be subversive of good municipal government, instead of an aid to it.

Even if the specifications appended to the charge had not contained in themselves a substantial cause, the petitioner could take no advantage from that—if on his appearance and full hearing the Commission had found him guilty of the general charge, and that general charge had stated a good cause. The charges and specifications need not have the accuracy of an indictment. Their object is simply to apprise the officer or employee accused with reasonable certainty of the charges against him, so that he may have a fair opportunity to defend himself. But the specifications clearly enough describe an offense quite sufficient to warrant the petitioner's discharge. The Act of February 16, 1874, to revise the law in relation to fugitives from justice does not, as counsel assumes, provide that the expenses which shall be paid out of the State treasury on the certificate of the governor and warrant of the auditor, shall include twelve cents a mile for all necessary travel in returning fugitives. It provides that the actual expenses up to and not exceeding twelve cents a mile shall be thus paid. The distinction is very obvious. To certify to twelve cents a mile when the actual expense was less, was "grafting" and pilfering—truly "a kind of dangerous affair." If the pe-

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tioner was guilty of it, or of any participation in it, either entirely for the benefit of a brother officer, or partly for his own, he was guilty "of conduct unbecoming a police officer," and was rightfully and justly discharged. Whether he was so guilty, we have no means of knowing, but the Civil Service Commission found him guilty, and we have no power, nor had the Circuit Court any power, to review its judgment in this regard.

The judgment of the Circuit Court quashing the writ of *certiorari* in question is affirmed.

Affirmed.

James F. Pendleton v. Chicago City Railway Company.

Gen. No. 9,504.

1. CONTRIBUTORY NEGLIGENCE—*when does not defeat recovery.* Contributory negligence on the part of the person injured does not relieve the party inflicting the injury from liability, if by the exercise of ordinary care after discovering the danger the accident could have been prevented, in other words, if the party has been guilty of wilful and wanton conduct; or if such party has been thus guilty in failing to discover the danger through recklessness or carelessness when the exercise of ordinary care would have discovered the danger and averted the calamity.

2. INSTRUCTION—*when erroneous, ground for reversal.* When an instruction is erroneous and conflicts with other instructions given in a cause, so that all the instructions when considered together are calculated to mislead the jury with respect to a material matter, a reversal will be ordered.

Action on the case for personal injuries. Appeal from the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1900. Reversed and remanded. Opinion filed December 24, 1901. Rehearing allowed January 7, 1902. Opinion refiled October 13, 1903.

BRANDT & HOFFMANN, for appellant.

W. J. HYNES and S. S. PAGE, for appellee; MASON B. STARRING, of counsel.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is a suit for personal injuries. A verdict was returned in favor of appellee and from the judgment in accordance therewith this appeal is prosecuted.

Appellant received the injuries complained of the latter part of November, 1895, about eight o'clock at night, when it is said the space between the rails of appellee's tracks was frozen over and slippery. Appellant ran across a vacant lot and approached the tracks from the east. He passed behind the first of two trains one running some distance behind the other and going north on the east rail of appellee's double tracks, crossed over the east rail, and was obliged to stop there by a train going south on appellee's west track which apparently he desired to take, and which was passing directly in front of him when he reached the space between the east and west of appellee's tracks. The second of the two north-bound trains was then approaching on the east track which appellant had just crossed, and according to the statement of appellant's counsel the gripman on said train "shouted to appellant, who thereupon threw up his hands, seemed frightened and immediately commenced to retrace his steps," starting back easterly across the east track. It is stated that he slipped and stumbled, but was near or upon the east rail of said east track, when he was struck by the east or right hand corner of the approaching train.

It is claimed that when the gripman shouted to appellant the car was about seventy feet distant, and could have been easily stopped in less than half that distance; and it is claimed that instead of trying to stop, the gripman ran at full speed against appellant, making no effort to stop until after the injury had been inflicted. It is urged that appellant's evidence discloses "a case of reckless, wanton and wilful misconduct on behalf of appellee which rendered it liable for the injury to appellant, no matter what his negligence may have been in going upon the tracks."

There was evidence introduced on behalf of appellee tend-

ing to show that appellant ran from the sidewalk directly against the northeast right-hand corner of the grip car, and that appellee was guilty of no negligence whatever. The evidence was conflicting, and unless misled by improper instructions the verdict of the jury must be regarded as settling the issue of fact in favor of appellee.

The jury were instructed at the instance of appellant, that if they believed the said injury was inflicted "recklessly, wilfully and wantonly, and that such recklessness, wilfulness and wantonness was the proximate cause of the injury to the plaintiff, then the jury are instructed that even though the jury may believe from the evidence that the plaintiff was guilty of negligence which contributed to the injury to himself, yet such negligence on his part will not, if the injury was so inflicted, prevent him from recovering, if he is otherwise entitled to recover."

The propriety of the foregoing instruction is not questioned. It has been held that contributory negligence on the part of the person injured does not relieve the party inflicting the injury from liability, if by the exercise of ordinary care after discovering the danger the accident could have been prevented, in other words, if the party has been guilty of wilful and wanton conduct; or if such party has been thus guilty in failing to discover the danger through recklessness or carelessness when the exercise of ordinary care would have discovered the danger and averted the calamity. *L. S. & M. S. Ry. Co. v. Bodemer*, 139 Ill. 596-606, and cases there cited. In *Wabash R. R. Co. v. Speer*, 156 Ill. 244-251, it is said: "It is well settled that where the injury results from the reckless, wilful or wanton act of the defendant, the plaintiff's right of recovery will not be defeated by his mere negligence, however great." See, also, *C. & N. W. Ry. Co. v. Smedley*, 65 Ill. App. 644-647, and cases there cited.

It is, however, urged in behalf of appellant that the court erred in giving at the instance of appellee instructions which it is said contradict the legal principles stated in the foregoing instruction given at appellant's request. That

some of the appellee's instructions so given are, when considered by themselves, liable to such imputation, is not seriously denied by its attorneys. The court told the jury, at the instance of appellee, after defining ordinary care, that "if a person receives an injury by reason of his failure to exercise such ordinary care, caution and prudence, or if he by the exercise of such ordinary care, caution and prudence would have avoided the injury, then he cannot recover for such injury," thus ignoring the principle before stated, that the absence of such ordinary care and caution would not defeat the right of recovery, where the injury was caused by a reckless, wilful or wanton act of the party by whom it was inflicted. The same error appears in different form in three other of the instructions given at the request of appellee's attorneys. These errors may, we think, reasonably be attributed not only to the mistake of appellee's counsel in asking instructions having no application under the declaration, but to the further fact that they asked the court for forty-one instructions, of which twenty were refused and at least four more should have been. To require the trial court to pass upon such a number of instructions, many of which were not called for in the case, was to invite an oversight oftentimes difficult to be avoided, and is a practice worthy only of condemnation.

It is urged that the judgment must be reversed because of these contradictions in the instructions given. That the contradiction is positive and repeated is beyond controversy. It may very well be that the verdict of the jury in appellee's favor was amply justified by the evidence. The fact remains that there was some evidence tending to sustain the charges of recklessness, wilfulness and wantonness in the declaration. The jury were told, nevertheless, that if they believed from the evidence the plaintiff, if he had exercised due care for his own safety, would not have been hurt, then he could not recover and it was their duty to return a verdict of not guilty; whereas, as we have said, it made no difference whether appellant was guilty of want of due care or not, if he was wilfully and wantonly injured

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by appellee. The instructions do not, when considered together, correctly state the law, and they conflict in a way which might very well mislead the jury. Under such circumstances the cause should be sent back for a new trial. *L. S. & M. S. R. R. Co. v. Elson*, 15 Ill. App. 80-83. In *C. B. & Q. R. R. Co. v. Naperville*, 166 Ill. 97-94, it is said: "It cannot be known what instructions the jury followed." See, also, *Quinn v. Donovan*, 85 Ill. 194-196; *Steinmeyer v. The People*, 95 Ill. 383-390.

For the errors indicated the judgment must be reversed and the cause remanded.

Reversed and remanded.

Frank Rabinovich, et al., v. Mildred Reith.

Gen. No. 11,909.

1. **INJUNCTION—when will not be ordered.** An injunction, the granting or the refusing of which is a matter of sound discretion, will not be ordered where it will operate oppressively, or where it is not the fit and appropriate mode of redress under all the circumstances of the case, or where it will or may work an immediate mischief.

2. **INJUNCTION—when will not be granted in abridgment of the right to labor.** An injunction will not be granted so as to abridge the right to labor unless the one restrained, if permitted to labor, would irreparably damage another, or by fair contract has bound himself not to engage in a definite employment for a certain length of time.

3. **PERSONAL SERVICE CONTRACT—when equity will not enforce.** The general rule is that contracts for personal services will not be specifically enforced in equity. This rule springs out of the fact that the court, in such a case, is unable specifically to carry its decree into effect. The negative enforcement of such a contract by the use of the injunctive process of the court will not be undertaken unless the services contracted for are purely intellectual, peculiar or individual in their character, and unless further there is contained in such contract a negative provision excluding service by the defendant for the person or persons other than the complainant.

Injunctional proceeding. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 1, 1905.

Statement by the Court. May 13, 1904, the parties hereto entered into the following agreement:

"This agreement is made between Rabinovich & Ogus and Mildred Reith. We agree to pay to Mildred Reith for services rendered as millinery trimmer \$35 a week.

The period of employment being one year, beginning February 22, 1904.

Also pay her expenses to New York City and return after July 4, 1904.

It is also understood that she is not to receive any salary while away from the the city or not actually at work.

The hours of work being as follows: From 8 to 12 A. M. and from 1 to 6 P. M. Also three evenings a week from 7 to 9:30 o'clock P. M."

Appellee quit the employment of appellants May 25, 1904. She says she was discharged on that date, while they claim that she then quit their employ without any good or sufficient cause. Appellee remained without employment from this time until in September of that year, when she engaged with competitors in business whose store was near that of appellants. Thereupon appellants filed a bill to enjoin appellee from entering the employ of any other person until the expiration of the term of service as set forth in the foregoing contract, upon the ground that the work of designing and trimming millinery hats is an act requiring great judgment, originality and talent, and involving personal judgment and the peculiar individual taste of the artist directing the work; and the bill alleges that appellee is a person of peculiar ability and great experience in catering to the particular class of custom upon which appellants are dependent; that it would be exceedingly difficult to fill her place with any other competent designer and trimmer, and that even if a designer and trimmer were procured, having ability, the work of such substitute would be so different from the work produced by the individual and personal talent of appellee as to be a very inadequate substitute for the personal services contracted for by them.

Appellee answered, setting up her wrongful discharge, and alleging that the work of designing and trimming hats

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is governed by the general fashion and not by the peculiar taste of appellee; that she entered into her new employment solely for the purpose of making a living, and that the services covered by the contract are not of such a personal and peculiar nature as to admit the interposition of a court of equity to enforce the contract, etc.

A preliminary injunction was granted. A motion was then made to dissolve the injunction, which was heard on bill, answer, replication and the affidavits submitted by the respective parties. Upon this hearing the chancellor dissolved the injunction and dismissed the bill for want of equity.

In its decree the court finds that the defendant is a person well familiar and experienced in the work of designing and trimming millinery hats, having skill and qualifications for said work and well familiar with the conditions and surroundings pertaining to complainants' business; that on May 25, 1904, the complainants discharged the defendant, and that the contract between them was then abrogated; that on the 5th day of September, 1904, the defendant engaged with competitors, located next door to the complainants' place of business; that by reason of the aforesaid discharge the complainants are not entitled to the relief prayed for.

From this decree the present appeal was perfected.

ELIJAH N. ZOLINE and HENRY RUSSELL PLATT, for appellants.

JACOB C. LeBOSKY, WILLIAM SLACK and JOHN C. WILSON, for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

We have examined this record and are of the opinion that the finding of the learned chancellor upon the facts is sustained by the evidence. It is not necessary to set out the bill, answer and affidavits in detail. The evidence is sharply conflicting, but when carefully scrutinized it is ap-

parent that it sustains the finding that appellants in violation of the contract discharged appellee May 25, 1904.

This conclusion is sufficient to justify the affirmance of the decree appealed from; but we feel that in deference to counsel we ought to consider the propositions of law involved herein which they have so ably argued.

Appellants employed appellee as "millinery trimmer" at \$35 per week. She agreed to work 61½ hours per week for that salary; and yet appellants allege that she "is a unique artist in her line of work;" and that in losing her services the damage suffered by them "is irreparable in its nature." This contract contains no negative covenants. Had appellants desired so to bind her when the contract was being considered, common fairness demanded that they get her assent thereto and then incorporate such a clause in the contract. This they did not do. The consequences which follow such omission must be borne by appellants.

It is elementary that an injunction, the granting or the refusing of which is a matter of sound discretion, will not be ordered where it will operate oppressively, or where it is not the fit and appropriate mode of redress under all the circumstances of the case, or where it will or may work an immediate mischief. 2 Story's Eq., sec. 959a, 12th ed. A court of chancery, as against the meaning of a contract, will not affix to it a negative quality and thereby import into it a covenant by implication; nor will it give its aid to one who is seeking to enforce a hard and unconscionable bargain. The general rule is that contracts for personal services will not be specifically performed in equity. This rule springs out of the fact that the court, in such a case, is unable to enforce its decree. The negative enforcement of a contract by the use of the injunctive process of the court will not be employed unless the services contracted for are purely intellectual, peculiar or individual in their character. In other cases the court leaves the party injured to his remedy at law. *Chain Belt Co. v. Von Spreckelsen*, 117 Wis. 106.

To support the proposition that a court of chancery will

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interpose by the writ of injunction to prevent the violation of a contract for personal services where such services involve the peculiar merits of the contracting party, or where the same performance cannot be insured by substituting another performer, or where the services of an equally skilled person are not readily procurable, appellants cite eight leading cases in England and in the United States. In each of six of these cases the contract set forth contained an express negative covenant. Also, in six of them the defendant was an actor or singer, in the seventh a surgeon, and in the eighth the defendants were acrobats.

The leading cases in England are *Lumley v. Wagner*, 1 DeG., M. & G. 604, and *Montague v. Flockton*, L. R., 16 Eq. 189. In the *Lumley* case, Miss Wagner, a celebrated singer, bound herself to sing at her Majesty's Theatre in London for the term of three months for 400 pounds per month; and further agreed not to sing at any other place during that period. She violated her contract and engaged to sing at Covent Garden in London. A bill was filed to enjoin her. The Chancellor, Lord St. Leonards, relying upon the negative condition in the contract, granted the injunction. He said: "I may at once declare that if I had only to deal with the affirmative covenant of the defendant, J. Wagner, that she should perform at her Majesty's Theatre, I should not have granted any injunction."

As carefully guarded as is this decision, it has not escaped criticism. In *Whitewood v. Hardman*, 2 Chy. Div. (1891) 428, Sir Nathaniel Lindley, speaking for the Court of Appeal, said: "I confess I look upon *Lumley v. Wagner* rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend. I make that observation for this reason, that I think the court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it attempted to enforce these contracts directly by a decree for specific performance, or indirectly by an injunction, appears to me to be immaterial."

In the Montague case Flockton, an actor, entered into a contract to perform for a certain period at the Globe Theatre in London. Before the expiration of that contract he proposed to act at the Crystal Palace. An application was made for an injunction. It was granted, notwithstanding the contract contained no negative clause forbidding him to perform elsewhere. In deciding the case Vice Chancellor Malins said: "There is no doubt whatever that the proper construction of these contracts is, that where a man or woman engages to perform or sing at a particular theatre for a particular period, that involves the necessity of his or her not performing or singing at any other during that time." This case is reviewed in *Whitwood v. Hardman*, *supra*, and is disapproved, Sir Nathaniel Lindley declaring that the whole judgment proceeded upon some misapprehension of the decision of Lord St. Leonards in the Lumley case.

In *Fox v. Scard*, 33 Beav. 327, a demurrer was filed to a bill which set up that Fox, a surgeon at Weymouth, had hired Scard, a surgeon, as an assistant at a salary, Scard agreeing that he would not carry on the business of a surgeon within Weymouth or within twelve miles thereof without the consent of Fox, etc. Fox discharged Scard, and the latter then began to practice in Weymouth on his own account. Sir John Romilly, Master of the Rolls, said: "The defendant has, for a valuable consideration, entered into an engagement not to practice at Weymouth, which he is bound to perform, and if the facts alleged be true, the plaintiff is entitled to relief in this court. The demurrer must therefore be overruled."

In *McCaull v. Braham*, 16 Fed. R. 37, the defendant, known as Lillian Russell, agreed with McCaull to act for him in comic opera during the season of 1882-3, at a stipulated salary; she agreeing not to act elsewhere or for any one else during the life of her engagement. McCaull filed a bill to enjoin her from singing during the lifetime of that contract in any other place than at the plaintiff's theatre, which the bill alleges she is about to do. A pre-

liminary injunction was obtained. The injunction upon argument was continued, the court saying: "Contracts for the services of artists or authors of special merit are personal and peculiar; and when they contain negative covenants which are essential parts of the agreement, as in this case, that the artists will not perform elsewhere, and the damages, in case of violation, are incapable of definite measurement, they are such as ought to be observed in good faith and specifically enforced in equity. That violations of such covenants will be restrained by injunction, is not the settled law of England."

While the rule in England may be that the court will import into the contract a negative condition where it is fairly to be implied from the contract, in the case of actors, singers, artists and other professional workers, where the contract stipulates for special, unique or extraordinary personal services by a party possessing such qualifications, the trend of American decisions is that even in such cases the court will not interfere unless there is an express stipulation forbidding service elsewhere. *Pom. Eq. Jur.*, sec. 1343; *Strobridge v. Crane*, 12 N. Y. Sup. 898; *Burton v. Marshall*, 4 Gill, 487; *Butler v. Galletti*, 21 How. Pr. 465; *Cort v. Lassard*, 18 Ore. 221; *Welty v. Jacobs*, 171 Ill. 624.

In *Welty v. Jacobs*, *supra*, Welty filed a bill, based upon a written contract, to enjoin Jacobs from hindering appellant from taking possession of the Alhambra Theatre, its appurtenances and stage property, and from hindering him from producing a play there in accordance with said contract, and enjoining appellees from using said theatre during said period of seven days, and from refusing to furnish appellant necessary light, music, etc. A preliminary injunction granted was set aside on hearing, and the bill was dismissed. The Supreme Court upon appeal say that the question is whether Welty's bill of complaint can be sustained, or he should be remitted to his action at law. "Negative covenants not to sing or perform elsewhere at a certain time than a designated place have been enforced by the injunction process, but further than this such contracts

have not been specifically enforced by the court's injunction or otherwise. (*Lumley v. Wagner*, 1 DeG., M. & G. 604; *Daly v. Smith*, 38 N. Y. Sup. 158.) In *Lumley v. Wagner* there was an express covenant not to sing elsewhere than at complainant's theater, and the injunction was placed on that ground." * * * "Before a contract will be specifically enforced there must be mutuality in the contract, so that it may be enforced by either, and as this contract was of such a nature that it could not have been specifically enforced by appellee Jacobs, it should not be enforced by appellant."

In *Cort v. Lassard*, 18 Ore. 221, it was sought to prevent certain acrobats from performing at another theatre than the one named in their contract, which contained a negative condition. After a full discussion of the authorities the court says: "It results, then, that if the services contracted for by the plaintiff to be rendered by the defendants were unique or extraordinary, involving such special merit or qualifications in them as to make such services distinctly personal and peculiar, so that in case of a default by them, the same or like services could not be easily procured, nor be compensated in damages, the court would be warranted in applying its preventive jurisdiction and granting relief; but otherwise, or denied, if such services were ordinary, and without special merit, and such as could be readily supplied or obtained from others without much difficulty or expense." And finding that the defendants were ordinary acrobats, the action of the trial court in dismissing the bill was sustained.

The principle which lies at the foundation of the exercise of the injunctive process of the court is the inability of the law to afford adequate redress. It is not sufficient to entitle the complainant to this relief that he allege irreparable damage. He must aver facts from which, if true, the court can fairly draw that conclusion. If the services of another person who can substantially fill the vacated place can be obtained, appellants are not entitled to the exercise of this exceptional jurisdiction. We have been

presented with no case where an employee in a mechanical or commercial business, not standing in a fiduciary relation to his employer, in the absence of a negative covenant, has been restrained from working for a competitor; and finding none in a somewhat extended research, we assume that no well-considered case of that character exists. On the contrary, we find that an injunction will not be granted to restrain a breach of contract by a baseball player (*American v. Harper*, 54 Cent. L. J. 449; *Columbus v. Riley*, 25 Weekly L. B. 385), an insurance agent (*Burney v. Ryle*, 91 Ga. 701), an expert machinist (*Chain Belt Co. v. Von Spreckelsen*, 117 Wis. 106), acrobats (*Cort v. Lassard*, 18 Ore. 221), a collector (*Sternberg v. O'Brien*, 48 N. J. Eq. 370), and a lithographer (*Strobridge v. Crane*, 12 N. Y. Sup. 898).

In this case appellants are not seriously seeking to compel appellee to return to her place that they filled soon after her departure. What they seek to do is to prevent her from working for a competitor. The effect of making permanent the injunction prayed for would be to compel her to go back to appellants under relations now strained to the uttermost, or else to remain idle; and thus, if dependent upon her labor for a support, she must beg her bread or live upon the charity of friends.

Appellants ask us to prevent appellee from trimming hats for any other person or from doing business in a city of two million people. When we reflect that among the most valuable rights one possesses is the right to labor, and that this right is also a public duty, it is manifest that by reversing this decree we would destroy more than we would preserve, and would do more injustice than justice. We will not abridge the right to labor unless the one restrained, if permitted to labor, would irreparably damage another, or by fair contract has bound himself not to engage in a definite employment for a certain length of time. *Allgeyer v. Louisiana*, 165 U. S. 578, 589; *Marks v. Watson*, 67 S. W. Rep. 391, 395.

In this case appellee never agreed that she would not work for some other employer during the life of her en-

gagement with appellants. All the conditions of the contract are affirmative. Notwithstanding the laudatory statements in their bill, appellants did not hire appellee as an artist or even as a designer, but as a "millinery trimmer" only. That women in this line of employment are many in this great city is shown by the affidavit of Martin Ascher, put in evidence in support of the bill, by which it appears that he "has employed during the year about two hundred different designers and trimmers."

We find nothing unique or extraordinary in this employment of trimming hats. It is undoubtedly true that appellee is well skilled in her work, but that work is largely mechanical and must follow the prevailing fashion to be acceptable to purchasers. It does not appear that the loss of her services inflicts irreparable damage upon appellants.

For the reasons stated the decree of the Superior Court is affirmed.

Affirmed.

ADAMS, J.: I concur in the *decision* of the cause.

H. W. Standidge v. Samuel A. Lynde.

Gen. No. 11,916.

1. EMPLOYEE—*what ground for discharge of.* The discharge of an employee is justified by his disobedience of the orders of his employer.

2. PEREMPTORY INSTRUCTION—*when giving of, harmless error.* Notwithstanding there is evidence tending to support the plaintiff's case, yet the direction of a verdict is harmless error which will not reverse where the entire evidence was of such a character as would have required any verdict rendered in favor of the plaintiff to have been set aside by the court.

Action of assumpsit. Appeal from the Circuit Court of Cook County; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 1, 1905. Rehearing denied May 18, 1905.

CHARLES MCGAVIN and H. W. STANDIDGE, for appellant.

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BARTON CORNEAU, for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

In September, 1898, appellee, a practicing lawyer, hired appellant as a stenographer and law clerk for one year at a salary of \$75 per month. In the latter part of May, 1899, appellee discharged appellant. The difference between what appellant was able to earn during the remainder of the term and the wages he contracted for was \$112.50, for which sum he brought suit. On the trial at the close of all the evidence the court directed the jury to return a verdict in favor of the defendant. To reverse the judgment entered on that finding appellant perfected this appeal.

It appears that one Saturday forenoon in the latter part of May, 1899, Mr. Lynde was engaged in the preparation of a brief to be filed in the United States Court the following Wednesday, and he was anxious to get the manuscript into the hands of the printer. When he left the office for luncheon Mr. Lynde said in the presence and hearing of Mr. Standidge that he was coming back that afternoon to work on the brief. Mr. Standidge followed Mr. Lynde out into the hall for the purpose of telling him that he, Standidge, had an engagement that afternoon to play baseball at Austin, but was unable to overtake him. Shortly thereafter Mr. Standidge went to luncheon, and returned to the office, when, after waiting a little time for the return of Mr. Lynde, he placed a note on Mr. Lynde's desk in which he expressed the hope that his absence would not inconvenience Mr. Lynde; and then went to the ball game and did not return that afternoon.

Mr. Standidge denies that he was helping Mr. Lynde on that brief in the forenoon; he says the remark of Mr. Lynde that he was coming back to continue work on that brief in the afternoon was addressed to witness Booth and not to plaintiff, and "thinking I might be of some assistance to him I ran to the door to explain that I was going away and to ask him what I could do to help him before I went,

but he was so far down the hall that I didn't have an opportunity to explain;" that Mr. Lynde discharged him the following Tuesday and refused to give any reason for his action.

Mr. Lynde says that during that forenoon he was working on that brief and Mr. Standidge was helping him, taking dictation and writing it out; that when he left the office for luncheon "I told Mr. Standidge I should be back there that afternoon, and that I wanted him there, and that I would continue this work on this brief; Mr. Standidge looked dissatisfied, but said nothing, and I left the office, and when I came back at the usual hour, at two o'clock, I did not find Mr. Standidge there, but instead I found a note on my desk," in which Mr. Standidge stated that he had a very important engagement which prevented him from being there that afternoon, and regretted that he should put Mr. Lynde to any inconvenience, etc.; that witness worked on the brief that afternoon and the next Monday told Mr. Standidge that in view of what had occurred he would have to leave the office at the end of the month.

Sherman Booth, the only person in the office aside from the parties hereto, says that during this Saturday forenoon Mr. Lynde was dictating a brief to Mr. Standidge; that as Mr. Lynde left the office he said, "We will go on with that brief this afternoon;" that as he went out the door Mr. Standidge followed him, and came back shortly; that Mr. Standidge went out for half an hour; that when he came back he wrote a letter on his typewriter and tore it up, and then wrote something which he put in an envelope and placed upon Mr. Lynde's desk; that he then came over to where witness was and said, "Well, I am sorry, but I had to do it; Mr. Lynde knew I wanted to play baseball this afternoon," and then went away; and that witness had not been working on that brief at any time.

If the evidence of Lynde and Booth is to be believed there was ample cause in the conduct of Standidge to justify his discharge. The burden of proof is upon the plaintiff to make out his case, and where his statement of the facts is

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met by the sworn denial of the defendant, "both having the same means of information and both unimpeached and testifying to a state of facts equally probable, a conscientious jury can only say that the plaintiff has failed to establish his claim. Without saying that this court would set aside a verdict for the plaintiff, rendered in such cases, on the ground alone that it was not sustained by the evidence, we must set aside one resting only upon the evidence of the plaintiff when that is contradicted not only by the defendant, but also by another witness, and there are no elements of probability to turn the scale." *Peaslee v. Glass*, 61 Ill. 94. This case, which stands unchallenged, has been followed by the Appellate Court. *Kenyon v. Hampton*, 70 Ill. App. 80; *Lister v. McKee*, 79 Ill. App. 211; *W. C. St. Ry. Co. v. Lieserowitz*, 99 Ill. App. 596; *Evergreen Park v. Bailey*, 107 Ill. App. 420. The fact that Mr. Standidge followed Mr. Lynde into the hall, that he left a note on the desk of Mr. Lynde regretting that he had to go, and his remark to Mr. Booth that he was sorry, materially weaken his denial that he knew Mr. Lynde expected his aid that afternoon. In other words, if the evidence of Mr. Standidge had been contradicted by that of Mr. Lynde only, the elements of probability were with the latter and against the former.

Had the trial judge submitted the case to the jury, as in strict law he should have done, since there was evidence supporting the material allegations of the declaration (*Woodman v. Ill. Tr. & Sgs. Bk.*, 211 Ill. 578), and the jury had found a verdict for the plaintiff, it would have been his duty, under the cases hereinbefore cited, to set aside that finding. In the nature of things the case of the plaintiff is as strong now as it ever can be made. Three men only were present when the thing occurred which caused his discharge. The case made by the plaintiff is directly contradicted by the defendant and by Booth. If hereafter the plaintiff should recover a verdict, it will have to be set aside either by the trial judge or by this court. Under these conditions the error of the trial judge in directing a

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verdict for the defendant is harmless. We will not set aside a verdict because a technical error was committed during the trial, if we are satisfied that substantial justice has been done. Leigh v. Hodges, 3 Scam. 15, and cases cited in note c.; Boynton v. Holmes, 38 Ill. 59; Hewitt v. Jones, 72 Ill. 218; I. & I. S. Ry. Co. v. Wilson, 77 Ill. App. 608; Nelson v. Richardson, 108 Ill. App. 127.

The judgment of the Circuit Court is affirmed.

Affirmed.

Edward L. Thornton v. M. Muus.

Gen. No. 11,922.

1. HUSBAND—*when competent as witness in suit by wife.* A husband is competent as a witness in an action instituted by his wife where the knowledge of the facts to which he testifies came to him directly from his acts of agency in and about his wife's business and relate to a contract in dispute which was entered into by him as her agent.

2. ABSTRACT—*effect of furnishing incomplete.* The Appellate Court will not go into the record in search of information which appellant should have furnished in the abstract, for the purpose of ascertaining if the case should not be reversed.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. WILLARD M. McEWEN, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 1, 1905.

ELMER H. ADAMS, for appellant.

EDWARD U. FLIEHMANN, for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

Muus sued Thornton in assumpsit for labor done and materials furnished in the repair of certain premises. The title to these premises was in dispute, and in the effect to adjust the differences the property had been deeded to Thornton in trust. Thereupon Thornton consulted with

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one Busby, who held an encumbrance on the property, and was told by him that the property was owned by the Insurance Company of North America, and that he, Busby, had employed one Colcord, an architect, to attend to the repairs and had \$1,000 on hand to pay for the work, which would probably exceed that sum. Thornton told Busby to go ahead provided the excess of cost should be taken out of the rents. Busby afterward made the contract here in issue with Muus and signed it in the name of Thornton. Busby says that at the time Muus took this contract he was told the manner in which the payments were to be made. It is not contended that Muus did not perform his part of this contract fully and to the satisfaction of all concerned; nor is it disputed but that Colcord gave him a certificate showing the completion of the work and that there remained yet due and unpaid thereon the sum of \$200.

Muus, Busby and Colcord each say that Thornton was at the building several times and gave directions as to part of the work. Muus took the certificate to Thornton at the request of Busby, and Thornton paid him \$75 thereon. This suit is for the remainder of \$125. During the trial Thornton filed an affidavit that the name Edward L. Thornton attached to said contract is not his signature nor was the same signed with his consent, knowledge or authority.

The cause was heard by the court, a jury having been waived, and a finding for the plaintiff in the sum of \$125 was entered, whereupon the defendant took this appeal.

The objection to the competency of Adolph Muus on the ground that he was the husband of the plaintiff is not well taken. The knowledge of the facts to which he testified must have come to him directly from his acts of agency in and about her business, and related to the contract here in dispute, which was entered into by him as her agent. Sec. 5, Ch. 51, R. S.; *Mitchell v. Hughes*, 24 Ill. App. 308; *Sargeant v. Marshall*, 38 Ill. App. 642.

Appellant contends that he is not bound by the contract

to which his name was affixed by Busby. The issue here, so far as appellant is concerned, is as to the validity or invalidity of the contract. No copy of this contract is to be found in the abstract. This court will not determine from an imperfect abstract the merits of a case, or the correctness of the rulings of the trial judge. We will not go into the record in search of information which appellant should have furnished in the abstract, for the purpose of ascertaining if the case should not be reversed. The rule requiring the furnishing of a complete abstract or abridgment of the record must be obeyed. *Mallors v. Crane*, 57 Ill. App. 284; *Fitzgerald v. Barker*, 58 Ill. App. 605; *Poppers v. Perkins*, 61 Ill. App. 250; *Leverenz v. Elder*, 65 Ill. App. 80; *March v. Strobridge*, 79 Ill. App. 685; *Amundson v. Empire*, 83 Ill. App. 441; *Douglass v. Miller*, 102 Ill. App. 345; *Gibler v. Mattoon*, 167 Ill. 22; *Staudé v. Schumacher*, 187 Ill. 188; *Thompson v. People*, 192 Ill. 81.

But if we assume that this contract was executed as appellant contends, still we think the finding is not manifestly against the evidence.

The judgment of the Superior Court is affirmed.

Affirmed.

William P. Black, Administrator, etc., v. George Thomson, Administrator, etc.

Gen. No. 11,928.

1. **REMEDIES**—*when cumulative and concurrent.* The remedy in equity to foreclose a trust deed and that at law to sue in assumption on the note secured by such trust deed, are cumulative and concurrent.

2. **FORECLOSURE PROCEEDING**—*who necessary and proper parties to.* The maker of a note and trust deed sought to be foreclosed is a necessary party to such proceeding; the administrator of a deceased maker likewise is a proper party to such a proceeding.

3. **JOINDER IN ACTION**—*when party estopped to deny propriety of.* A party joined in an action is estopped in a subsequent proceeding to deny the propriety of such joinder where he appeared, answered and did not in any way raise the question as to the propriety of his having been so joined.

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4. *RES JUDICATA—what is.* The findings of a decree in a foreclosure proceeding are *res judicata* in an action at law instituted upon the notes foreclosed where the parties are identical and no question of jurisdiction is raised.

5. *RES JUDICATA—what does not affect.* The fact that an appeal from a decree containing certain adjudication is still pending and undisposed of, does not affect its conclusive character in another action between the same parties involving the same subject-matter, where no question of jurisdiction is raised; nor does the order in which the respective suits were instituted in anywise affect the question as to the effect of the decree.

Contest in court of probate. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed May 1, 1905. Rehearing denied May 18, 1905.

Statement by the Court. July 15, 1896, Dougald Muir, then the executor of the estate of James Reid, deceased (now represented by appellant), filed a claim in the Probate Court of Cook County, Illinois, against the estate of Isabella H. Thomson, deceased (now represented by appellee), on twelve promissory notes for \$500 each, dated June 1, 1892, due in eight years from date with interest at five per cent. per annum, signed by Duncan M. Thomson and Isabella H. Thomson, his wife. A trial was had in that court which resulted in a verdict for appellee. The probate judge set the verdict aside. When the claim came up again for hearing, no defense was made, and it was allowed May 18, 1898, for \$7,639.17. An appeal was taken to the Circuit Court. The judgment of allowance was correctly noted on the claim by the probate judge and on the docket. The appeal bond followed that finding, but the transcript filed in the Circuit Court described the judgment as in favor of Joseph N. Barker, administrator of the estate of Isabella H. Thomson, deceased, instead of in favor of Joseph N. Barker, the then administrator of the estate of James Reid, deceased, and also stated that the appeal was by said Barker instead of by George Thomson, administrator of Isabella H. Thomson, deceased.

The claimant failed to follow the appeal and the claim was dismissed May 9, 1899. September 29, 1900, the claim-

aut entered a special appearance and moved to vacate the order of dismissal, which motion was denied November 3, 1900. From the action of the court in this regard an appeal was perfected to this court. Upon the hearing we reversed and remanded the cause, saying, among other things: "There being no transcript of any judgment such as that appealed from, the court had not jurisdiction of the subject-matter when the judgment was rendered, and could not try the cause." *Barker v. Estate of Isabella H. Thomson*, 98 Ill. App. 78. This opinion was filed November 7, 1901. Thereafter the cause was reinstated in the Circuit Court. November 2, 1900, but without leave of court, a correctional order entered by the Probate Court, which supplied the defect in the transcript, was filed among the papers of this case in the Circuit Court.

July 27, 1900, the administrator of the Reid estate filed a bill in the Superior Court to foreclose a deed of trust given to secure the payment of these notes. To that bill the administrator of the estate of Mr. and Mrs. Thomson and all the heirs and devisees of each of them, were made parties. The defendants in a joint and several answer set up as a defense that on April 2, 1892, Duncan M. Thomson borrowed of James Reid \$6,000 to purchase the premises described in the bill; and being thus indebted about June 1, 1892, he executed and delivered the notes and trust deed in question, except that at that time neither the notes nor trust deed were signed by Isabella H. Thomson; that about the 1st of October, 1892, the notes and trust deed were delivered by Reid to Dougald Muir, his agent, for the purpose of having the same signed by said Isabella, and afterwards, on the 3rd of November, 1892, the trust deed and notes were signed by her; that she received no valuable consideration and never had any interest in the property purchased with the money except an inchoate right of dower; that at that time it was represented to her the only purpose of her signing was to release her dower right in the property, and she did not know she incurred any liability by signing the notes and trust deed; that the estate

of said Isabella having already suffered one judgment of liability on the notes, and the matter being then pending by appeal in the Circuit Court, the complainant had no right to a trial in and a judgment of the Superior Court upon that question; and that the estate of said Isabella had no interest whatever in the mortgaged premises. At the hearing these defenses were disregarded by the chancellor, who entered a foreclosure decree April 7, 1902, which contained, among other things, a direction to the master to report the amount of the deficiency, if any, on the sale, and that "when such amount of deficiency is ascertained the same shall be allowed against each of said estates of Duncan M. and Isabella H. Thomson, payable in due course of administration as of class 7."

Appellee here, and defendant there, appealed the cause to this court, where the decree of the Superior Court was affirmed. Thomson v. Barker, 108 Ill. App. 437. The cause was thereafter taken to the Supreme Court, where the judgment of the Appellate Court was affirmed. Thomson v. Black, 208 Ill. 229. It is but fair to state, that the question argued in each of the reviewing courts was as to whether or not that portion of the decree which provides for the allowance of the deficiency after sale, if any, against the estates of the makers of the notes and trust deed, was valid. Each court held that as to this question the appeal was premature, and affirmed the decree of the Superior Court. April 17, 1902, a trial was had in the Circuit Court on the reinstated claim before Judge Hanecy. The claimant introduced the notes and the decree of the Superior Court. Judge Hanecy held the decree final and *res judicata* as to the liability of the estate of said Isabella on the notes, and excluded all matters of defense tendered by said estate, and directed a verdict for the claimant, upon which he entered judgment. Being informed that an appeal was about to be taken from said foreclosure decree, the court retained control of its judgment, so that if the decree was reversed he could set such judgment aside and hear the cause upon its merits.

In the early part of 1904 the motion pending to vacate the judgment entered upon the claim by Judge Hanecy (his term having expired), was called up before Judge Dunne of the Circuit Court, who set aside the judgment and granted a new trial. May 17, 1904, the trial of the claim was had before Judge Dunne and a jury. Before the jury was called the claimant moved to dismiss the appeal on the ground of variance between the bond and the transcript on file, which motion was overruled. After the jury was impanelled the defendant's attorney stated, among other things, that he would prove that Dougald Muir, the attorney and agent of James Reid, represented to Isabella H. Thomson, at the time she signed the trust deed and notes in suit, that the only object in having her sign them, was to release her dower in the premises described in the trust deed, and that he would further prove that Isabella H. Thomson did not receive any part of the money, and that there was no consideration for her signing the notes and trust deed.

The claimant put in evidence the notes and trust deed, and then offered in evidence in full and in detail the said foreclosure proceedings, to which offer the defendant objected. The objection was sustained and the claimant duly excepted to the ruling. The claimant then put in evidence the summons issued in the foreclosure case showing the service thereof upon the administrator of the estates of D. M. and Isabella H. Thomson, and also a demurrer to said foreclosure bill filed by said administrator August 27, 1900. The defendant then offered evidence tending to prove the defense outlined in the opening address of counsel. The jury returned a verdict against the claimant, and the court entered judgment thereon. From which judgment appellant, the claimant, perfected this appeal.

WILLIAM R. PLUM, for appellant.

FRED H. ATWOOD, FRANK B. PEASE, WILLIAM S. CORBIN
and CHARLES O. LOUCKS, for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

The contention in this case is as to the effect of the decree rendered in the foreclosure proceedings upon the present suit, when such decree is offered in evidence as *res judicata*. The issue in each suit was whether or not these notes were binding upon the estate of Isabella H. Thomson, deceased.

It is elementary that one holding promissory notes secured by a trust deed, may bring assumpsit on the notes and also may file a bill to foreclose the trust deed at one and the same time. The pendency of one of these suits cannot be pleaded in abatement of the other. Each court has jurisdiction to hear and determine the issues involved in the cause before it. Both actions may proceed to final judgment. The only limitation is that there can be but one satisfaction.

The estate of Isabella H. Thomson, deceased, was a proper party to the foreclosure proceedings. She had signed the notes and trust deed. Had she lived until that suit was started she would have been a necessary party. *Gilbert v. Maggord*, 1 Scam. 471; *Leonard v. Villars*, 23 Ill. 322; *Wiltsie's Mtg. Forcl.*, secs. 135, 207. Mrs. Thomson having died before the suit in equity was begun, her administrator was a proper party thereto. Even if this were not so, appellee is estopped to raise the question by his appearance in that suit, filing an answer therein, and contesting the right of appellant to a decree.

The facts of this case render the citation of authorities unnecessary upon the question of what is and what is not *res judicata*. It is admitted that the parties in the two actions are the same, and that the same defense was interposed to the claim in the law trials before Judges Hanecy and Dunne as was set up in the chancery proceedings. The decree in the Superior Court preceded the first trial upon the claim in the Circuit Court. That decree has never been set aside. On the contrary it was affirmed by this court and by the Supreme Court. It fixed the liability of the es-

tate of Mrs. Thomson to pay any deficiency that might arise from the sale.

No question of jurisdiction was involved in the offer in the trials at law to put in evidence the foreclosure proceedings, and then, if admitted, to ask the court to pass upon their effect. The law court had still the right to hear and determine the case before it upon such competent evidence as the parties might see fit to present for its consideration.

The fact that the decree of foreclosure was appealed from and that such appeal was pending at the time of the trial before Judge Haney, did not suspend the effect of the decree as *res judicata*. An appeal does not destroy the lien of a judgment or decree. Until vacated that decree was competent and conclusive evidence in the suit at law, both cases being between the same parties and upon the same subject-matter. *Brown v. Schintz*, 203 Ill. 136, and cases cited. Even if this were not the law, appellee is not advantaged thereby, for the reason that prior to the trial before Judge Dunne the decree had been affirmed.

"A judgment is properly deemed a bar to further litigation on principles of public policy, because the peace and order of society require that a matter once litigated should not again be drawn in question." 6 *Wait's Actions & Defenses*, 787.

"The judgment of a court of competent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter directly in question in another court." DeGrey, C. J., in *Duchess of Kingston's case*, 11 *State Trials*, 198, cited in 2 *Smith's Lead. Cas.*, 573.

The order of time in the bringing of the two suits is immaterial. A prior judgment upon the same cause of action sustains a plea of a former recovery, although the judgment is in an action commenced subsequently to the one in which it is pleaded. 6 *Wait's Actions & Defenses*, 769; *Casebeer v. Mowry*, 55 Pa. St. 422; *Sharon v. Hill*, 26 Fed. R. 337-344. *Sharon v. Hill*, *supra*, was a suit brought by Sharon October 3, 1883, to have a certain alleged declara-

tion of marriage between himself and the defendant declared to be false and fraudulent and be delivered up to be canceled, etc. November 1, 1883, Hill, by the name of Sharon, commenced a suit for divorce from Sharon in the Superior Court of the State of California, in which this declaration of marriage was set up. In December, 1884, the State Court found that said declaration of marriage was true and genuine. From this decree an appeal was taken which was pending at the time of the trial of Sharon v. Hill. In that trial the finding of the Superior Court was set up as *res judicata* between the parties. In passing on this matter the court says: "One other question remains to be disposed of before passing to the consideration of the genuineness of the alleged declaration of marriage, and that is the effect of the finding and adjudication of the Superior Court in Sharon v. Sharon. At first blush I was of the impression that this suit having been first commenced, neither the right to maintain it, nor the determination of any question involved therein, could be affected by any finding or judgment in the case of Sharon v. Sharon. But on further reflection and examination of the authorities I am satisfied that the law is otherwise as to the effect of the finding or judgment. It matters not in which suit the subject of the controversy or any question involved therein is first determined; the result may be set up as a bar or estoppel, as the case may be, against the further litigation of the same matter in the other. The maxim, *interest reipublicæ ut sit finis litium*, equally applies."

In Allis v. Davidson, 23 Minn., 442, Allis brought suit August 17, 1874, in the District Court of Ramsey County, Minnesota, to impeach the validity of a note and mortgage and to procure their cancellation. While that action was pending Davidson filed a bill in the U. S. Circuit Court to foreclose the same mortgage, and obtained a decree of foreclosure in which the amount due upon the note was ascertained, a sale ordered, and Allis found to be personally responsible for the deficiency, if any, arising from the sale. Davidson set up these matters in a supplemental

answer in the first suit. Allis demurred. The court overruled the demurrer. On appeal the Supreme Court say: "Under the issues tendered by the bill of complaint in that (U. S. Court) suit, the validity of the note and mortgage in controversy, and the amount due thereon, were necessarily involved and adjudged by the judgment therein rendered. The jurisdiction of the court being undoubted, both as respects the subject-matter and the parties, it follows that its judgment, when properly pleaded, is a conclusive bar to any further litigation of the same matters arising between the same parties in any other action, whether such other action was begun before or after the suit wherein judgment was rendered."

In *Bellinger v. Craigie*, 31 Barb. 534, the plaintiff sued Craigie, a physician, for malpractice. While the case was pending the defendant brought an action of *assumpsit* before a justice of the peace for his fees, and recovered a judgment for the whole amount claimed. Upon the trial of the first case the defendant interposed the justice judgment as *res judicata*. Held, that as the plaintiff's claim was within the issue joined in the justice court, and its determination necessarily was included in that judgment, such judgment was a bar to the cause of action set up in the first suit. See, also, to the same effect, *Davis v. Bedsole*, 69 Ala. 362; *Maher v. State*, 53 Ga. 448; *Paine v. Schenectady Ins. Co.*, 11 R. I. 411; *President, etc. v. Brown*, 50 Me. 214; *Duffy v. Lytle*, 5 Watts, 131.

Our conclusion is that the trial court committed reversible error in excluding the foreclosure proceedings offered in evidence by appellant, and therefore we reverse the judgment of the Circuit Court and remand the cause.

Reversed and remanded.

The Hurrle Glass Company v. H. M. Hooker Company.

Gen. No. 11,988.

1. ACCORD AND SATISFACTION—*what constitutes*. Where the parties to a controversy, each having full knowledge of the facts and without legal compulsion, meet and settle a disputed account, an accord and satisfaction result and the transactions involved in such settlement are deemed merged therein and not subject to be reopened by either party.

2. CROSS-EXAMINATION—*when improper*. Objections to questions calling for answers as to material facts, are properly sustained upon cross-examination where such questions were not based upon anything asked upon direct examination.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 1, 1905.

Statement by the Court. Appellant, a glass manufacturer of Indiana, in 1900 and 1901, entered into three written contracts with appellee, a wholesale dealer in glass, of Chicago, Illinois, to deliver to the latter 18,000 boxes of glass within stipulated dates. Under the last contract there was a shortage in delivery of nearly 3,000 boxes. In the meantime the price of glass had advanced. In the summer of 1902 appellee was indebted to appellant in the sum of \$11,383.29 for glass delivered, but he claimed damages to the amount of about \$5,000 because of such shortage, and refused to pay anything on account until such claim was adjusted. In July, 1902, C. J. Hurrle, the secretary of appellant, came to Chicago to effect a settlement. He and the general manager of appellee met for that purpose, and at the close of the second interview they agreed upon a reduction and compromise of \$2,555. Thereupon appellee, in pursuance of such agreement, paid to appellant the sum of \$8,826.04, being the whole amount due less the sum of \$2,555 agreed upon as damages, and appellant in consideration of said payment gave to appellee a written receipt "in full settlement to this date of all demands or claims of whatsoever natures; and all contracts are hereby cancelled." Afterward this suit was brought to recover the sum of

\$2,555. Upon the foregoing facts appearing in evidence the court directed the jury to return a verdict for appellee. This was done, and judgment was entered against appellant for costs. The present appeal was then perfected.

DUNCOMBE & EVANS, for appellant.

E. C. MAPLEDORAM, for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

The direction of the court to the jury to return a verdict for the defendant was clearly right. These parties, each having full knowledge of the facts, and neither being under legal compulsion, met to settle a disputed account. After a full discussion of the claims of each at their second interview they agreed upon a contract of compromise and settlement. Thereupon the amount thus found due was paid by the one and accepted by the other, and a receipt in full was given by appellant to appellee. Having made this bargain and having received its benefits, appellant is estopped to reopen the transaction.

Appellant urges that the case should be reversed because the court would not permit it to ask Hayes, a witness called by appellee, if he did not, as a member of the National Window Glass Jobbers Association, in July, 1901, vote to put out all the fires in all the factories in the State of Indiana, and thus bring on the strike of 1901-2; and that if he did not know that such action would be taken when he, acting for appellee, entered into the contracts in evidence. These questions were asked upon cross-examination, but were not based upon anything contained in the examination in chief. Hence the objection to each question was well taken and the ruling of the court thereon was correct.

The judgment of the Superior Court is affirmed.

Affirmed.

Warren v. Clemenger.

Charles D. Warren, et al. v. John C. Clemenger.**Gen. No. 11,946.**

1. **STATUTE OF LIMITATIONS—how construed.** Statutes of limitation are statutes of repose and should be construed liberally so that the object for which they are enacted may be attained.

2. **STATUTE OF LIMITATIONS—when bars action upon promissory note.** The 10-year statute in this State bars an action upon a promissory note where more than ten years have elapsed between its maturity and the institution of suit thereon, notwithstanding the defendant lived from time to time in different jurisdictions and had not remained in any one jurisdiction a sufficient length of time to bar such note.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 1, 1905.

Statement by the Court. Appellants brought suit against appellee upon certain promissory notes executed in 1880, and which fell due on or prior to May 1, 1881.

The parties stipulated that all pleadings except the declaration and the plea of the general issue should be stricken from the files, which was done; and leave was given appellee, then defendant, to offer all defenses under the plea of the general issue. The parties also submitted the cause to the court for trial, and entered into a stipulation as to the facts of the case.

The only evidence offered upon the trial was the stipulation of facts. At the close of all the evidence appellants moved the court to find the issues for them. This the court refused to do.

Appellants also submitted to the court four propositions of law. These the court marked as refused, and overruling a motion for a new trial found the issues for appellee. Appellants then perfected this appeal.

The following is a summary of the facts as shown by the stipulation hereinbefore referred to: That in 1880 the defendant, who at said time resided in the city of Toronto, Ontario, executed to the firm of Moore & Warren Bros., a copartnership, consisting of one Berry Moore and these

plaintiffs, Charles D. Warren and William A. Warren, at said time also residing and doing business in said city of Toronto, certain enumerated promissory notes aggregating \$2,894.24; that the notes were delivered to Moore & Warren Bros. by defendant in payment for goods and merchandise sold and delivered by Moore & Warren Bros. to defendant; that the notes were made payable in said city of Toronto; that the notes in all respects were valid, legal and enforceable obligations in the Province of Ontario at the time of their execution and delivery; that as to those notes made by third parties to Clemenger and indorsed by Clemenger to Moore & Warren Bros., said notes were, when due, enforceable obligations against Clemenger the same as if they had been his personal notes; that the notes were indorsed after maturity to these plaintiffs by the said Moore & Warren Bros., and are now the property of the plaintiffs. That at the time the notes were made and delivered, the plaintiffs were and are now and have been at all times since the making and delivery of the notes, residents of the city of Toronto, Ontario; that the defendant at the time the notes were made and delivered, was also a resident of said city of Toronto, and had been for some years prior thereto; that about the 25th of February, 1881, before a number of the notes became due and payable, the defendant left the Province of Ontario and has not resided in said Province or the Dominion of Canada since, and has not been in said Province since leaving there, except a short time on a visit in 1886, of which the plaintiffs allege they did not know. That on leaving Ontario in 1881, the defendant moved to Bradford, Pennsylvania, and resided there for about two years next following; that about 1883, defendant moved from Bradford, Pennsylvania, to Richberg, New York, and resided there about one year; that defendant left said Richberg about 1884, and moved to Kansas City, Missouri, where he resided for about seven years then next following, or until December, 1891; that in December, 1891, defendant moved from Kansas City to Chicago, and has resided in Chicago since said time. That

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this suit was begun in March, 1900. That if, upon the foregoing statement of facts and the proofs that may be offered, the court shall find that the right of action or the remedy on any of the said notes is not barred by the limitation laws of the State of Illinois, and that a recovery on any of the said notes may be had in Illinois, the court shall enter judgment for the plaintiffs for the sum of \$1,500.

LACKNER, BUTZ & MILLER and C. E. HECKLER, for appellants.

PHELPS & CLELAND, for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the Court.

At common law the rule is that a right of action never dies. But because time outlasts witnesses and wears away evidence of payment, it was early found necessary, for the protection of those who were once debtors, and to quiet titles, to enact a statute of repose fixing a time after the right of action accrued beyond which it could not be enforced. Accordingly, in every jurisdiction in which the common law prevails there is now to be found, in varying words, a Statute of Limitations prescribing a boundary to the right to bring an action at law. In this State the time thus limited is amply sufficient to permit a diligent creditor to enforce his claim. The statute affects the remedy merely and not the merits of the controversy. It is a statute of repose, and should be construed liberally so that the object for which it was enacted may be attained.

In this case appellee left Toronto, Canada, in February, 1881, before all the notes became due. Thereafter he lived two years at Bradford, Pennsylvania, one year at Richberg, New York, seven years at Kansas City, Missouri, and then in December, 1891, removed to Chicago, Illinois, where he has since resided. This suit was commenced in March, 1900. The last of these notes matured May 1, 1881.

Counsel for appellants state the question before the

trial court and before this court in these words: "Does our Statute of Limitations begin to run against a debt created in a foreign jurisdiction between non-resident debtor and creditor at the time the debt became payable in such foreign jurisdiction, or when the debtor comes into this State and the debt thus for the first time has an existence and becomes a suable and enforceable demand here?"

They assert that the propositions of law tendered by them to and refused by the court accurately present this question, and if such propositions had been "held" they would have determined the issues in favor of appellants. They further say: "We do not contend that this section (16 of the Limitation Statute) has no application to causes of action created in another jurisdiction, but we do contend that it cannot apply until the person against whom the cause of action exists comes into this State and the cause of action thus comes into existence and is an enforceable demand here, because the legal meaning of the word 'accrued' is 'to become an enforceable demand.'" Therefore, they contend, this section in effect declares that an action must be commenced within ten years next after it became suable and enforceable in the State of Illinois. And that when read in connection with section 20 of the same Act, which provides that when a cause of action has arisen in a State or territory out of this State, or in a foreign country, and, by the laws thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon cannot be maintained in this State, it appears that a foreign debtor must live down the period of limitation of some one jurisdiction, and when he has done so he can come into Illinois and be exempt from further prosecution; but unless he can show that the debt is barred by reason of lapse of time in some one jurisdiction in which he has lived since the debt matured, he is subject to prosecution in Illinois within ten years after he could be sued here. To these propositions they cite a number of authorities from other States, nearly all of which are based upon special statutes of the several States in which the opinions are rendered.

On the part of appellee it is contended that section 16 of our Limitation Act, which reads, "Actions on * * * promissory notes * * * shall be commenced within ten years next after the cause of action accrued," is a complete bar to this suit; that when the last of these notes fell due, May 1, 1881, the payees were living in Toronto where the notes were made payable, at which time the cause of action then accrued to them; and that there is no exception to the plain words of section 16, other than is provided in section 18, that if, when the cause of action accrues the defendant is out of the State, or after the cause of action accrues he departs from this State, the time of his absence shall be no part of the time limited for the commencement of the action; and that this latter action has no application to the case at bar.

It is clear that said section 18 was enacted to favor residents of this State as against residents of other States, territories and foreign nations, and to relieve them from the necessity of following their debtors into other jurisdictions under penalty of losing their debts by the running of the statute. *Story v. Thompson*, 36 Ill. App. 373.

A cause of action accrues upon a promissory note at the time it becomes due and payable and is unpaid. *Story v. Thompson*, 36 Ill. App. 370, 377; *Wooley v. Yarnell*, 142 Ill. 447; *Kreitz v. Behrensmeyer*, 149 Ill. 506.

In *Chemung Canal Bank v. Lowery*, 3 Otto, 72, the plaintiff recovered a judgment in the State of New York. Suit was brought on it in Wisconsin more than ten years after its recovery, against the defendant, who had lived in the latter State less than ten years before he was served with summons. He interposed the Statute of Limitations of Wisconsin as a defense. That statute is the same as our section 16. It was contended by the plaintiff that the limitation law did not apply, because the defendant had not been in Wisconsin ten years before he was sued. The court, however, held that the action was absolutely barred because it was not begun within ten years after the judgment was recovered in the State of New York.

In *Beardsley v. Southmayd*, 15 N. J. L. 171, suit was brought in New Jersey upon promissory notes which were made and became payable while both plaintiff and defendants resided in Connecticut, and the parties continued to live there for more than six years after the cause of action accrued. When the suit was brought the plaintiff still resided in Connecticut, while the defendants were residents of New Jersey, but had not been in that State for the term of six years. The defendants invoked the protection of the Statute of Limitations. The court say: "The question, therefore, presented by the pleadings is whether a non-resident creditor, who has a demand against a non-resident debtor of more than six years standing and which would have been barred by our statute, if both parties, or if the defendant only, had resided here, can pursue him into this State, and maintain an action against him." After calling attention to the fact that the plaintiff admits he was a non-resident of New Jersey when the notes were made, and has ever been a non-resident, the court continues: "Now the question arises, when did the plaintiff acquire a right to bring an action in this State? Why, as soon as the cause of action accrued, for he had as much right to bring an action then as he had after the defendant came here. His right of bringing an action in New Jersey did not depend upon the defendant's coming into this State, though his doing so to any useful purpose might have depended on that event." The court further say that the rights of a non-resident plaintiff are not saved under the statutes of New Jersey until the debtor has resided in the State for six years; if it were so, the right of action would be saved indefinitely, and a non-resident creditor would be put on a better footing than a resident creditor. The opinion concludes with an order for judgment in favor of the defendant.

In *Bemis v. Stanley*, 93 Ill. 230, in August, 1877, Bemis sued Stanley upon a judgment recovered in Ohio in March, 1859. The defendant pleaded the Statute of Limitations, to which the plaintiff demurred. The demurrer was sus-

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tained and judgment was rendered against the defendant. Upon appeal the court held that the judgment sued on was embraced in section 15, which provides that such an action shall be commenced within five years next after the cause of action accrued, and that, therefore, the defendant's plea constituted a complete defense to the action, and the trial court erred in sustaining the demurrer.

We regard this case as controlling in the present appeal. It follows that the action of the trial judge in marking the propositions of law tendered by appellants "refused" was correct, and that his finding for appellee was right.

The judgment of the Superior Court is affirmed.

Affirmed.

W. J. Hall v. First National Bank of Chicago.

Gen. No. 11,926.

1. **DECLARATION**—*when count on check does not state cause of action.* A declaration by which it is sought to recover from a bank the amount of a check drawn thereon, is fatally defective in not alleging that such bank had on hand sufficient funds at the time of its presentation with which to pay the same.

2. **CONSPIRACY**—*when does not constitute cause of action.* In civil cases a conspiracy does not constitute a cause of action; it is the resulting wrong and not the conspiracy which gives the right of action, if any there be.

Action on the case. Appeal from the Circuit Court of Cook County; the Hon. EDWARD O. BROWN, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 1, 1905.

HAMMOND & MACON, for appellant.

ORVILLE PECKHAM and NEWMAN, NORTHRUP, LEVINSON & BECKER, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an action in case by appellant against appellee. The court sustained a general demurrer to the declaration and rendered judgment against appellant for costs.

The declaration contains three counts, in substance as follows :

The first count avers that on the 10th day of March, 1904, the plaintiff was the owner and possessor of a certain bill of exchange, draft or check, for the sum of \$1,149.45, dated March 8, 1904, which was drawn by the Cedar Rapids National Bank of Cedar Rapids, Iowa, upon the defendant, payable to plaintiff's order; that plaintiff paid for the same the face value thereof to the maker, and a premium of fifty cents; that on the first-mentioned date he presented it, properly endorsed, between banking hours, for payment, to the defendant at its place of business in the city of Chicago, and that the defendant "then and there wilfully, negligently and unlawfully" refused to pay it, to plaintiff's injury and damage in the sum of \$10,000, etc.

The second count avers the same facts contained in the first count, and concludes with the charge that the defendant "wilfully, maliciously, fraudulently and unlawfully destroyed the value of said bill, draft or check, and wilfully, maliciously, fraudulently and unlawfully destroyed the negotiability thereof, by writing across the face of the same the words, 'payment stopped,' to the injury and damage of plaintiff," etc.

The third count avers the same facts contained in the first count, and concludes with the charge that "said defendant then and there wilfully, maliciously, fraudulently and unlawfully conspired with the Cedar Rapids National Bank, etc., to hinder, delay and defeat the plaintiff in the collection of his said debt, and did * * * hinder, delay and defeat him, etc., to the injury and damage," etc.

It is not averred in any of the counts that there was any money to the credit of the drawer of the check in the First National Bank with which to pay the check. This is a necessary averment; because, if the bank had no money to the credit of the drawer of the check, it properly refused to pay it. This disposes of the first and second counts of the declaration. If there was no money in the bank to the credit of the drawer, the check was valueless, and conse-

quently, the appellant could not be damaged by writing the words "payment stopped" across the face of it. In civil actions there can be no recovery on a mere averment of conspiracy. "The wrong is the gist of the action when damage results, and not the conspiracy." *Martin v. Leslie*, 93 Ill. App. 44, 56, and cases cited.

In *Garing v. Fraser*, 76 Me. 37, the court say: "To charge all the defendants joint action must be proved, and the allegation of a conspiracy may be a proper mode of alleging it; but for any other purpose it is wholly immaterial, and it does not change the nature of the action or add anything to it." This applies where there are several defendants. Here there is only one defendant, and the question is what the defendant (appellee here) did. What are the facts on proof of which a recovery is sought? And the third count does not aver what appellee did, but merely that it conspired.

Appellant's counselloite authorities which are only applicable in cases where the bank on which the check is drawn has funds to the credit of the drawer with which to pay the check, which authorities are clearly inapplicable here, as there is no averment that appellee had such funds. The rule being that a pleading is to be construed strictly against the pleader, the inference from the omission to aver that the bank had funds of the drawer, must be that it had not. There is no precedent for an action *ex delicto* in the case of a bank refusing to honor a check, even when it has money to the credit of the drawer sufficient to pay it, and we think it unnecessary to discuss the question whether such an action will lie in such case. *Via trita, via tuta*. The judgment will be affirmed.

Affirmed.

Mr. Justice BROWN took no part in the decision of this case.

William Osner v. James Zadek, by next friend.**Gen. No. 11,920.**

1. **PRACTICE ACT—section 57 construed.** That portion of section 57 of the Practice Act which provides that “no more than two new trials upon the same grounds shall be granted to the same party in the same cause,” has no application to cases in which material errors of law have intervened.

2. **MASTER—when not liable for failure to furnish reasonably safe machinery.** The master is not liable for the failure to furnish reasonably safe machinery where it appears that he used the utmost diligence to procure the same and that there was no defect therein discoverable by the exercise of ordinary diligence.

3. **INSTRUCTION—when erroneous, cannot be cured.** When an instruction purports to state facts, on proof of which the jury may find for a party, and the instruction is erroneous, it is not susceptible of cure by any other instruction in the series, because the jury may have based their verdict on the erroneous instruction, regardless of all others given, and it cannot be known that they did not.

Action on the case for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed May 1, 1905.

WHITFIELD & WHITFIELD and SAMUEL W. JACKSON, for appellant.

EDWARD MAHER and ROBERT F. KOLB, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This action is case by appellee against appellant for negligence *per quod* appellee was injured. Appellee recovered judgment for \$1,500. The declaration contains two counts. In the first count it is averred that prior to May 18, 1897, the plaintiff had been employed and was then in the employ of the defendant, and working at a machine operated by steam power, pressing certain pieces of leather called soles; that plaintiff was, to wit, eighteen years of age and ignorant of the operation of the machine, and the danger attending its operation; that he was ordered by defendant's foreman to operate it, and that it was defendant's duty, by

Osner v. Zadek.

said foreman, to instruct plaintiff how to operate the machine and in regard to the danger attending such operation, which the defendant neglected to do, by reason whereof, and while plaintiff was exercising due care, plaintiff's right hand was caught between two portions of the die, which was a part of the machine, and severely crushed and mangled. The second count is for negligence, in not maintaining the machine in a reasonably safe condition and state of repair. The defendant pleaded the general issue.

We have carefully considered the evidence and the arguments of counsel, and our conclusion is that the verdict, in finding the appellant guilty of negligence, is manifestly against the great weight of the evidence, and appellee's counsel do not seriously contend that it is not, but urge that there is evidence to sustain the verdict, and that, inasmuch as the last was the third trial of the cause, and the appellee obtained a verdict in his favor on each trial, the judgment should be affirmed, citing section 57 of the Practice Act and *Parmy v. Farrar*, 204 Ill. 39. Section 57 provides: "But no more than two new trials, upon the same grounds, shall be granted to the same party in the same cause." We have no means of knowing on what grounds new trials have been granted by the trial court. The case cited has no application to cases in which "material errors of law have intervened." The 5th instruction for appellee is as follows:

"The court instructs the jury that under the law it was the duty of the master, Osner, to furnish the servant, Zadek, with reasonably safe appliances, tools and instrumentalities with which to work. And if you believe from the evidence that the plaintiff was injured while in the exercise of that care for his own safety required of one of his age, capacity and experience, and by reason of the negligence of the master in failing to provide reasonably safe appliances, tools and instrumentalities, with which the plaintiff was to work, as alleged in the declaration, then you may find a verdict for the plaintiff."

Under this instruction the jury may have found for the plaintiff if they believed from the evidence that the ma-

chine was not reasonably safe, even though appellant used the utmost diligence to procure a safe machine, and even though there was no defect in the machine discoverable by the exercise of ordinary diligence. This is not the law. "The master's obligation is not to supply the servant with absolutely safe machinery, or with any particular kind of machinery; but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary and unreasonable danger." *Chicago, R. I. & P. R. R. Co. v. Lonergan*, 118 Ill. 41, 49. "The law imposes on the company the obligation to use reasonable care and diligence in providing suitable and safe machinery," etc. *Ib.* 48. In this case the preponderance of the evidence tended to prove not only that appellant exercised reasonable care to furnish a safe machine, but that the machine was safe when used with ordinary care. The instruction is erroneous and requires a reversal of the judgment. *Belleville P. & S. Works v. Bender*, 69 Ill. App. 189; *Wabash R. R. Co. v. Farrell*, 79 *Ib.* 508.

No instruction given tends to cure the error of the 5th instruction, on the hypothesis that it is susceptible of cure; but when an instruction purports to state facts, on proof of which the jury may find for a party, and the instruction is erroneous, it is not susceptible of cure by any other instruction in the series, because the jury may have based their verdict on the erroneous instruction, regardless of all others given, and it cannot be known that they did not. *Ill. I. & M. Co. v. Weber*, 196 Ill. 526, 531.

We think the giving of both the 6th and 7th instructions obnoxious to criticism. The 7th is little, if any, more than a repetition of the 6th. "The practice of emphasizing, by repetition, tends to prejudice the rights of litigants." *Mareck v. City of Chicago*, 89 Ill. App. 358, 361.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

William Fitzgerald v. Mathias Benner, et al.

Gen. No. 11,918.

1. **VERDICT**—*when not disturbed.* A verdict will not be set aside on appeal as against the preponderance of the evidence unless such preponderance is so clear and decided as to leave no substantial doubt in the minds of the court.

2. **"TESTIMONY"**—*use of, instead of "evidence," held not reversible error.* The use of the word "testimony" instead of "evidence," while technically inaccurate in a case where documentary proof was interposed, does not constitute reversible error where it is clear from all of the instructions that it was not intended to exclude from the consideration of the jury the documentary proof so in evidence.

3. **ARCHITECT'S CERTIFICATE**—*when not essential to recovery.* An architect's certificate made by a building contract a prerequisite to payment, is not essential to recovery where it is shown that it was withheld in bad faith.

4. **INTEREST**—*when error in instruction upon, will not be considered.* An alleged error in an instruction upon this subject authorizing interest, will not be considered if it appears from the entire record that the jury could not have included interest in the verdict rendered.

5. **HEARSAY EVIDENCE**—*when admission of, not reversible error.* The admission of hearsay evidence, not of a prejudicial character, is not ground for reversal.

6. **REMARKS OF TRIAL COURT**—*when not prejudicial.* Held, that it was not prejudicial for the court to say that he would like to have a witness present who had gone away and left with counsel a letter which was produced in evidence, and to say in relation to the testimony of a witness as to the weather, when such testimony seemed to be doubted, "If he is not right, you can bring in the weather bureau man."

7. **ARCHITECT**—*question as to when, official arbiter of damages.* The Appellate Court, in this case, referring to a contract under which it was contended that the architect was the final arbiter of the damages for delay, expressed a decided doubt as to whether such was the case.

Action of assumpsit. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 1, 1905.

DAVID K. TONE and WILLIAM H. FITZGERALD, for appellant.

WILLIAM A. DOYLE, for appellees.

MR. JUSTICE BROWN delivered the opinion of the court.

This appeal is from a judgment in favor of appellees against appellant in the Circuit Court of Cook County for \$6,000. The judgment was upon a verdict of a jury for that amount in an action of assumpsit. The suit was upon a building contract between Fitzgerald on the one side and Benner and Kent on the other, by which Benner and Kent agreed to erect, build and complete the iron work for a flat building to belong to Fitzgerald, to be erected at the corner of 26th and State streets in Chicago. The price to be paid by Fitzgerald to Benner and Kent was fixed by the contract at a certain sum for castings a ton, another for beams per ton, and at other sums per pound for punching, copying and riveting, and for anchors, steel plates, stirrups and straps. A certain sum was also named as the price per square foot for Hyatt lights.

The contract was dated August 22, 1892. Between that date and May 27, 1893, material and labor, which at the prices named would amount to \$22,908.63, were furnished by the appellees, Benner and Kent. November 23, 1892, \$5,000 was paid them, December 17, 1892, \$5,000, and February 21, 1893, \$6,500, leaving, according to the contention of the appellees, \$6,408.63 due.

It is not denied by the appellant that the labor and material claimed to have been furnished by the appellees were so furnished, but it is contended by him that the appellees have, under their contract, no claim against the appellant for any amount, unless the architect named in the contract has so certified, and that the architect refused so to certify as to this balance claimed, or any part thereof; that the architect was the ultimate and sole arbitrator of any dispute between the parties to the contract, and has decided in good faith that the appellant owes the appellees nothing, and therefore the appellees should have recovered nothing in this suit. Further appellant contends that without reference to the lack of the architect's certificate, the verdict is excessive because it is shown by the preponderance of the evidence that there are due from the appellees

to appellant liquidated damages for delay stipulated for in the contract, to an amount which must in any event reduce the claim of the appellees under the contract to a sum much less than the verdict and judgment against him, if it does not obliterate it. To this deduction of stipulated damages for delay should be added another, it is claimed, for twenty defective columns furnished by appellees and condemned by the architect, but not removed or replaced, and the two deductions together, it is urged, even if the smallest sum for which there is ground in the evidence is allowed for the damages for delay, justify the refusal of a certificate by the architect and demonstrate the injustice of any judgment against the appellant.

It appears that these questions were submitted to the jury by the trial court under instructions concerning them asked by the appellant and given by the court, that were, as will be hereinafter noted, even more favorable to the appellant than seems to us justifiable.

The jury were by the instructions told that the fact that appellant has occupied since November 1, 1893, the building in question, does not prove that he accepted the work of the appellees or conceded that it was properly performed, and that if a dispute arose between the appellant and appellees as to whether appellees had completed the iron work specified in said contract, within the time specified in said contract, and the jury believed from the evidence that the architect honestly and in good faith decided that appellees had failed so to complete the contract, and that by reason of said fact there was no money owing to the appellees by the appellant, then the verdict must be for the appellant, whether the architect decided correctly or not; because, under the contract, both parties had agreed that the decision of the architect when honestly made should be final and binding upon the parties. In various forms the jury were instructed that it was the duty of the architect, Warren, to decide whether the appellees had completed the iron work within the time specified, and if not, what damages at the rate of \$50 per day, as

stipulated in the contract, were due to the appellant for such delay; and that if Warren had honestly and in good faith decided that because of such damages or because the appellees had failed to complete the work in accordance with the contract and specifications, no money was due to the appellees, the decision was binding and the jury must give it effect by finding for the defendant.

Further, the jury were instructed that, if they believed from the evidence that the appellees had failed to prove by the preponderance of the evidence that the architect, Warren, fraudulently, and in collusion with the appellant refused to issue a final certificate to the appellees, that their verdict should be for the appellant.

There was conflicting evidence before the jury as to whether the appellees were guilty of any delay, not the result of "causes beyond their control," namely, "the delays of other contractors and rainy weather."

There was conflicting evidence as to whether any complaint was made of the character of certain columns furnished by appellees, and there was a very distinct and irreconcilable clash of testimony in reference to the conversations and transactions from which the want of good faith on the part of the architect was to be inferred or negatived.

Under these circumstances, it is not for us to pass on the relative credibility of witnesses, no one of whom is impeached, and unless there is such a clear and decided preponderance of evidence as to leave no substantial doubt in our minds—such a preponderance as does not appear in this record—we ought not to disturb the verdict of the jury or hold that the assignments of error which depend on the inconsistency of such verdict with the weight of the evidence, are well taken.

We are confined, therefore, in this case, to the consideration of the alleged errors in the trial below which resulted in the verdict in question.

It is claimed by appellant that there are such errors, (a) in the giving of each of the four instructions, which were

asked by the appellees and which are numbered 16, 17, 18 and 19; (b) in the admission and exclusion of evidence; and (c) in improper remarks made by the trial judge and by appellees' counsel without the interference of the court.

Instruction 16 is this:

"The court instructs the jury that in this case he has not expressed, and does not in any of these instructions express, any opinion on the facts of the case, nor upon the credibility or want of credibility of any witness. The facts must be decided by the jury from the testimony which is received in open court. Offered testimony to which objection was sustained, or which was stricken out by order of the court, is not before the jury and should not be considered in arriving at your verdict. Statements of counsel for either side, if any, which are unsupported by the testimony, or which are irrelevant to this case, should not be considered.

The instructions given you by the court are to be considered as a series.

The court has not expressed an opinion on the facts and has not expressed an opinion on the credibility or character of any witness, and the court has no right to do so, and if the jury overheard anything said between the court and counsel in discussing questions of law or otherwise, the jury should not consider anything but the evidence introduced before them, and the law as laid down in the instructions of this court."

The complaint made of this instruction is that it is therein said that "the facts must be decided by the jury from the testimony which is received in open court," and that this direction excluded, or might by the jury have been supposed to exclude, from their consideration, all the documentary evidence introduced in the cause.

The instruction was undoubtedly technically inaccurate in the use of the word "testimony" instead of "evidence," but we do not think there is the slightest possibility of the jury having been misled by it. The case had been hotly contested; controversies had occurred in the hearing of the jury respecting the introduction of documentary evidence; almost every other instruction in the whole series had specifically called the attention of the jury to their duty to

determine the questions at issue from the evidence, and this very instruction complained of closed by telling them that they "should not consider anything but the *evidence* introduced before them and the law as laid down in the instructions of the court."

We do not think this judgment should be reversed for the inaccuracy noted.

Instruction 17 is as follows:

"If you believe from the evidence and the instructions of the court that the architect or superintendent named in the contract in this case accepted the work performed by the plaintiffs as the work progressed, as required by the contract, and if you further find from the evidence that such contract was completed in accordance with the terms thereof, and you further believe from the evidence that after the contract was completed the architect accepted the work performed by the plaintiffs, and if you further believe from the evidence and instructions of the court that the architect withheld or refused to deliver to the plaintiffs his statement or certificate in writing showing the amount due the plaintiffs, if anything, either because the defendant, the owner, directed him, the said architect, to withhold or not to deliver the same, or for any other reason not in accordance with the terms of the contract between said parties if shown by all the evidence in this case, then you are instructed if you find such facts proven from the evidence, that the plaintiffs would not be bound to produce such certificates before they were entitled to recover in this case."

This instruction is vigorously attacked by appellant. It is said to assume "the important and closely disputed proposition of fact" that "the owner directed" the architect "to withhold or not to deliver" his certificate. Although this contention is strenuously pressed and numerous cases in this court and in the Supreme Court are brought to our attention where, as it is urged by appellant, a similar construction has been given to similar words, we are entirely unable to see that there is any such assumption in the instruction when its language is construed according to its natural and obvious meaning.

"If you further believe * * * that the architect withheld or refused to deliver to the plaintiffs his state-

ment or certificate in writing showing the amount due the plaintiffs, if anything, either because the defendant, the owner, directed him, the said architect, to withhold or not to deliver the same, or for any other reason not in accordance with the terms of the contract between said parties," means, according to the plain intent of the language, as it seems to us,

"If you believe that the owner directed the architect to withhold the certificate, and if you believe that for that reason the architect did so withhold it, or if you believe (without reference to question of the owner's directions) that the architect withheld the certificate for any reason not in accordance with the terms of the contract—"

To import an "assumption" into the language of this instruction such as the appellant insists is contained therein, is "to consider too curiously." We are very sure that the jury did no such thing.

The second objection made to the instruction is that it told the jury in effect that if the work was actually completed in accordance with the terms of the contract and the architect erroneously decided that it was not, then the jury should disregard the decision of the architect and find a verdict for the plaintiff, whereas the law is that as the contract makes the architect the final arbiter of all disputes between the parties, no recovery could be had without showing actual fraud on the part of the architect. This objection rests on the use of the words "or for any other reason not in accordance with the terms of the contract," as it is evident that if the architect were by the contract the final arbiter of all disputes concerning payments and refused to deliver the plaintiffs his certificate, because the owner told him not to deliver it, the action would be fraudulent.

But if the words quoted can be considered to indicate a merely erroneous decision by the architect against the claim of the appellees, and not a wilful and therefore fraudulent refusal to use his judgment as the contract requires, which we think is doubtful, and if the contract is to be properly held to make the architect a final umpire in all matters involving payments or damages under it, which we also think

doubtful, the language of this instruction, although it would be inaccurate and technically erroneous, yet could not be held to be dangerous or misleading to the jury or to constitute reversible error, in view of the distinct enunciation of the proposition in several instructions given at the request of the defendant that to excuse the production of the architect's certificate, the burden of proving bad faith and a fraudulent purpose on his part was upon the plaintiffs. The instructions must be regarded as a series and together, and the jury was so informed.

The other objections made by the appellant to this instruction we do not regard as important. The one most insisted on is that the instruction told the jury the plaintiffs were entitled to recover although the stipulated damages for delay might exceed the balance due on the contract. The instruction does not so declare. It purports to state only what would excuse the production of the architect's certificate—not all the elements, nor indeed any of them, essential to a recovery. It did not "direct a verdict for either party or amount to such a direction in case the jury should find certain facts" (Illinois Central R. Co. v. Smith, 208 Ill., 608), and viewed in connection with the preceding instructions—as it must be—we find in it nothing misleading or justifying a reversal.

Instruction No. 18 is:

"The court instructs the jury that if you believe from the evidence that the architect, Clinton J. Warren, in this case inspected the work in question and knew its character and quality, and that said architect accepted the work done and materials furnished by the plaintiffs as being in compliance with and in full performance of the contract on plaintiffs' part, and if you further believe from the evidence and under the instructions of the court that said contract was completed in accordance therewith, and you further believe from the said evidence that said architect in bad faith and without just cause refused to deliver to the plaintiffs a final certificate showing such acceptance and completion and the balance due the plaintiffs, if any, then the plaintiffs are entitled to recover whatever, if anything, the jury shall find from the evidence is due upon the contract."

We do not agree with appellant's contention that this instruction was erroneous. The ordinary construction of language applied to it relieves it from the objections urged against it. If the architect first, on full inspection of the work, adjudged it to be "in compliance with and full performance of the contract" (it actually being so), and then in bad faith refused to give the plaintiffs a certificate, certainly the plaintiffs were entitled, without such a certificate, to recover "whatever, if *anything*, was due on the contract." The instruction plainly enough means this and nothing more, and the objections made to it are hypercritical.

Instruction 19 is on the allowance of interest. We see no error in the instruction as given, and even if there were, we think it was proven not to be prejudicial to the appellant by the fact that it plainly enough appears from the record of the case before us that the jury allowed no interest and took neither the instruction nor the testimony concerning interest into account in determining the amount of their verdict. Counsel say that "this court has no right to assume that the jury returned a verdict for \$6,000 principal and did not include in that any portion of the interest." We think that this depends on what the entire record shows concerning the pleadings, evidence and instructions before the jury, and that this court not only may have the right, but also the duty of determining what elements the jury apparently considered in their assessment of damages.

The case cited in appellant's argument, *Hartford Deposit Co. v. Calkins*, 186 Ill. 104, is not in point. Each case must depend on its own circumstances, and in the *Hartford Deposit Co.* case the Supreme Court says it is unable to see how the Appellate Court, "*under the facts of that case*," could assume that the error only affected the appellant to the amount of \$1,000.

Under the facts of *this* case, we do not think that the instruction or the admission of evidence concerning interest was erroneous; nor, under the facts of this case, do we think that either affected the verdict of the jury.

Much stress is laid by appellant upon the alleged error of the trial court in refusing to strike out a portion of an answer made by the witness Anderson. The record shows the following question and answer and ruling:

"MR. DOYLE: Q. What was the condition, if you remember, of the piers in the basement at the end of September of that year, as to whether or not they were ready for the work—the iron work?

"MR. ANDERSON: A. Well, they commenced to be ready on, I should judge, a day or two before I started, because they were anxious to let me in there just as soon as I could get in, because there was lots of iron, and of course I was busy, and I asked every day, telephoned every day, 'Can't I start?' because I had a gang idle. I wanted to get at it, and they was kicking about the iron laying all over the street and they wanted to get me into it as quick as I could.

"MR. TONE: I move to strike out 'that he telephoned every day;' they knew the condition.

"Motion denied by the court. To which ruling of the court the defendant by his counsel then and there duly excepted."

This hardly bears out the assertion of the appellant's argument that "counsel for appellant then moved to strike out the telephone conversation above detailed between Anderson and his principals out of the presence of appellant, which motion was denied by the court."

But even giving the incident and ruling that construction, we should find no reversible error therein. The question that the witness was asked was about the condition of the piers, and that he answered. The rest of his answer was irresponsive and might certainly have been stricken out without error by the court, on motion of defendant or of its own motion. But for the court to decline to do so, after the testimony had once been heard by the jury, was certainly not reversible error. The rest of the answer amounted to nothing. It was not "a conversation," but merely a statement to the jury of witness' own state of mind and actions, as connected with and confirming his recollection of the condition testified to. It does not even

appear who "they" were who were "kicking," and who "wanted to get witness into it." Not every erroneous admission nor every refusal to strike out hearsay evidence is ground for reversal. We are of the opinion that the statement that witness "telephoned every day"—it does not appear even to whom—"Can't I start?" could not by the remotest possibility have affected the verdict of the jury, and consequently that even if it had been admitted erroneously over objection, it should not reverse the judgment. But as above noted, it does not appear that any motion to strike out anything but the declaration that witness "telephoned every day" was made and denied.

We do not think appellant's claim of reversible error on account of the use of a memorandum book by the witness Anderson, is well taken. It does not appear by the record that he used it in his direct examination for any purpose except to refresh his memory. He answered in said direct examination certain questions as to what kind of memoranda he kept in his book, but this could not have been injurious or erroneous in itself. Thereupon, on cross-examination, appellant's counsel asked him to *look over his book* and tell how many days it rained during September and October, 1892. He was asked also by counsel for appellant to name such days and give all the days during said months that he was stopped from working by rain. After a very considerable cross-examination by counsel for appellant, on the subject of the book and its contents, the witness was interrogated by counsel for the appellees again, and was requested to give the condition of the weather in November and from December 1 to December 19, 1892. To this question counsel for defendant objected *as immaterial*, which objection was overruled. Then the redirect examination proceeded without further objection and was followed by a recross-examination concerning the same matter. We do not think that there is any merit under these circumstances in the contention of appellant in regard to this book.

There are no other alleged errors which we think merit any extended discussion.

That the trial judge did not strike out of Mr. Kent's testimony the words "He" (meaning Mr. Warren) "kept putting me off," that he used his discretion in limiting an extended cross-examination directed to the credibility or recollection of the witness, and that he at first rejected evidence as to what passed between the architect, Warren, and his employee Kearns, although afterward practically admitting it all, certainly furnishes no ground for reversal.

We see no objection to any of the remarks of the trial judge during the trial, as they appear in the record.

To say that he would like to have a witness present who had gone away and left with counsel a letter which was produced in evidence, and to say in relation to testimony of a witness as to the weather when such testimony seemed to be doubted, "If he is not right you can bring in the weather bureau man," is not to discredit or lend credence to either witness. Nor can we see how either remark could prejudice the jury. One was the expression of a perfectly natural and harmless wish, and does not necessarily imply that there was any criticism made of the witness who had gone; and the other was the statement of an undeniable truth, as far as possible from "practically telling the jury the witness on the stand should be believed by them." The complaints concerning these remarks inject into them meanings that we have no right to find there.

Undoubtedly during the trial heated language was used by counsel, to which the appellant might rightly object. But there is nothing which it can be seriously urged should cause a reversal of this judgment.

Finding no reversible error in the record committed against appellant, we should not be justified in disturbing the verdict and judgment. We are not, therefore, called upon to decide some other questions which are suggested by our reading of the contract on which the suit is brought. But it makes us the more willing to affirm this judgment as in accord with substantial justice, that it is at least very doubtful whether the instruction given at the request of appellant, by which the jury were told that it was the

duty of the architect, Warren, to decide whether the plaintiffs had completed the iron work within the time specified in said contract, and if not, then to decide the amount of damages at \$50 a day that defendant was entitled to be allowed, and that his decision, whether right or wrong, was conclusive—was not more favorable than it should have been to the appellant.

The contract says that "damages for delay will be \$50 a day for each and every day the work remains unfinished *after above date*." "The above date" is "at such time as is set forth in the specifications." The time set forth in the specification is *blank*. The specification says also that "damages for delay will be \$50 per day for each day the work remains unfinished *after above date*." As indicated the "above date" is represented by a blank.

It was an extreme ruling in favor of appellant which, under these circumstances, gave to the architect the conclusive right to deduct from appellees' bill \$50 a day as liquidated damages for any delay whatever, and this is not changed by the language of the contract itself under the heading "Time." That language seems to be admitted by appellees to constitute a provision that as to completion of the skeleton structure a certain time was specified, although by itself the paragraph makes no stipulation, provision or engagement, but is a collection of words without grammatical construction.

It was probably intended, however, as counsel treat it, as an agreement as to the time by which various portions of the structural work should be finished, but there is no provision for liquidated damages of \$50 a day in connection with it. The "above date" after which said damages were to be charged, is clearly stated to be "the date set forth in the specification," which is no date at all.

Nor are we satisfied that the contract gave the right to the architect, Warren, to pass upon the damages for delay, liquidated or otherwise. The work is to be done according to drawings and specifications made by him, the materials and labor to be furnished under his direction and super-

vision. Improper material and work are to be removed when he so directs, and the appellant is only to pay, on the presentation of his certificates; fifteen per cent. is to be held back until the architect declares the contract completed.

Again, "should delay be caused by other contractors, a just and proper amount of extra time shall be allowed by the architect, provided," etc. "And in case the parties shall fail to agree as to the true value of extra or deducted work, or the amount of extra time, the decision of the architect shall be final and binding. *The same in case of any disagreement between the parties relating to the performance of any covenant or agreement herein contained.*" * * * "Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by the architect, and his decision shall be final and conclusive."

We presume that it is the language we have italicized on which the appellant relies for the construction of the contract claimed by him and allowed by the court below, but although in the view we take of the case, we are not called on to decide the question, we think it more than doubtful whether this or any of the other language in the contract makes the architect a final arbiter of the damages for delay. The decisions of this court in *Nelson v. Pickwick Associated Company*, 30 Ill. App. 333, and *Frost v. Rand, McNally & Co.*, 51 Ill. App. 276, are authorities committing us to the contrary view. The language there and here is very different from that in *Fowler v. Deakman*, 84 Ill. 130, where the architect was an arbitrator "to settle all disputes between the parties."

The judgment of the Circuit Court is affirmed.

Affirmed.

Pauline Brennan v. Electrical Installation Company.

Gen. No. 11,925.

1. **RIGHT OF ACTION**—*when, cannot be denied by this State.* The legislature of this State cannot deny a right of action given by the laws of a sister State where at the time such right of action came into being, it was recognized by the laws of this State.

2. **RETROACTIVE EFFECT**—*when not given to statute.* No statute will be construed to operate retrospectively unless the intent that it shall do so is manifested by clear and unequivocal language.

3. **INJURIES ACT**—*amendment to construed.* The amendment of 1903, providing that "no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State," is not retrospective in its operation.

4. **COMMON LAW**—*presumption of identity in sister State.* The presumption is that the common law prevailing in a sister State is the same as the common law existing in Illinois; if the contrary is claimed, it must be clearly demonstrated.

5. **MASTER**—*when not obligated to protect servant.* If the master has neither created the danger, nor in the exercise of the care required of him has had knowledge or means of knowledge of its existence, then he is under no obligation to protect his servant therefrom.

6. **RELEASE**—*what does not operate as.* Neither the reception of money directly from one wrong-doer nor the securing thereof from the sale of a judgment against such wrong-doer, would, in the absence of a release or of an accord and satisfaction, discharge or release another joint wrong-doer, except *pro tanto*.

Action on the case for death caused by alleged wrongful act. Appeal from the Superior Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed May 1, 1905.

Statement by the Court. This appeal is by Pauline Brennan, a widow, who, as plaintiff in the court below, sued the Electrical Installation Company as defendant in an action on the case for causing the death of her husband, by which she was left with four minor children and without means of support. The cause was submitted to a jury, who found a verdict for the defendant, on which verdict, after a motion for a new trial had been made by appellant and overruled by the court, a judgment for costs was rendered against appellant. From this judgment an appeal

was taken and in this court it is assigned as error that the verdict was against the weight of the evidence, and that the court erred in giving each of the instructions given on behalf of the defendant, and in overruling the plaintiff's motion for a new trial. Other assignments of error are made, but these are all that are argued or relied on.

The suit was originally brought in the Superior Court on January 23, 1900, by Patrick H. O'Donnell, as administrator of the estate of James M. Brennan, and a declaration in one count filed. But on April 23, 1904, an order was entered by the Superior Court allowing plaintiff to amend all papers in the proceedings, by changing the party plaintiff from "Patrick H. O'Donnell, administrator of the estate of James M. Brennan" to "Pauline Brennan," and giving leave to plaintiff to file an amended declaration. Thereupon the declaration in five counts, on which the cause was tried, was filed. The first count of this amended declaration describing the plaintiff as the widow of James M. Brennan, who died intestate, alleges that the defendant, the Electrical Installation Company, was engaged as an independent contractor in wiring and rewiring a certain system of electric lighting in the city of Vicksburg, owned by the Vicksburg Electric Light Company, a Mississippi corporation. And that the deceased, James M. Brennan, was employed as a lineman by the said defendant, and on the 3rd day of July, 1899, while in the course of his employment, was at work on a pole situated in said city of Vicksburg, and was in the exercise of all due care for his own safety, but that he was carelessly and negligently permitted and ordered to remain upon said pole of the said Vicksburg Electric Light Company, which the defendant was rewiring, although there was among the wires a certain dangerous feed wire, which was uncovered, and of which the defendant knew or should have known, and that defendant ordered and permitted deceased to be upon the pole after six o'clock in the evening, although the defendant knew or should have known that the current was liable to be turned on at that time. Further alleges that the current was so

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turned on and James M. Brennan was killed. And by reason thereof Pauline Brennan, the widow, brings her suit, by virtue of a certain statute of the State of Mississippi, being chapter 65 of the Session Laws of 1898, entitled, "An Act to amend Chap. 86 of the Act of 1896; being entitled 'An Act to amend Section 663 of the Annotated Code of 1892 as to actions for an injury causing death,'" which states that wherever the death of a person shall be caused by any real, wrongful or negligent act of omission or by unsafe machinery, ways or appliances, as would have entitled the person to sue if death had not ensued, that thereupon, if said deceased person shall have left a widow or children, or both, etc., the person causing the death shall be liable for the damages, and the action may be brought in the name of the widow, and the suit shall inure to the benefit of all parties concerned, and the jury shall take into consideration all damages of every kind to all parties interested in the suit, and such action shall be commenced within one year of the death.

Section 2 provides that the act shall apply to all personal injuries to servants or employees received in the service or business of the master where such injuries result in death.

Section 3 provides that the damages recovered shall not be subject to the payment of debts, and provides for their distribution among the parties interested.

The count further alleges and sets up another statute, found in chapter 87 of the Session Laws of 1896 of the State of Mississippi, which provides that every employee of a corporation shall have the same rights and remedies for an injury as are allowed to other persons not employed by the corporation where the injury results from the negligence of a superior agent or officer, and also where the injury results from negligence of a fellow-servant. Knowledge by an employee injured by reason of defective condition of any machinery, ways or appliances shall be no defense to an action for the injury; and where death ensues the action may be brought in the name of the widow, etc.

There is a further averment in the count that James M.

Brennan left surviving him the plaintiff as his widow, and four minor children, and that by reason of the death of her husband, the plaintiff is deprived of her means of support and damaged to the amount of \$30,000.

The second count sets up the same statutes and alleges the negligence of the defendant in allowing, permitting and ordering Brennan to remain on said pole, although it knew the place was dangerous because of a dangerous live wire attached to the pole.

The third count alleges the negligence of the defendant in not notifying the Vicksburg Electric Light Company that Brennan was at work upon the pole.

The fourth count alleges that the defendant knew, or should have known, that a certain current of electricity was to be turned into a wire upon the pole where Brennan had been ordered by it to work, about six o'clock P. M., and that it became the duty of the defendant to keep Brennan informed as to the correct time, but that the foreman of the defendant company owned and used a watch which was too slow, wherefore, by reason of the defendant's negligence the said Brennan was killed.

The fifth count alleges the duty of the defendant to furnish good and competent servants in the work on which Brennan was engaged, and its negligence in employing an incompetent servant—one J. E. Bell, a foreman—by reason of which negligence Brennan was killed.

All the counts set forth the same statutes of Mississippi that the first count does.

A general demurrer to this amended declaration was filed, argued and overruled, and the defendant then pleaded the general issue. On the issues thus made up a trial on May 2, 1904, resulted in a verdict for the defendant.

DARROW, MASTERS & WILSON, for appellant; MURRAY F. SMITH and R. L. McLAURIN, of counsel.

O. W. DYNES, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court. Counsel for appellant ask us to reverse the judgment and

remand this cause on account of "evidence improperly admitted," of "errors in the instructions," and of "the weight of the evidence."

The testimony is sharply conflicting, and we should not interfere with the verdict of the jury or the judgment on it, on account of their alleged inconsistency with the weight of the evidence, if we were satisfied that the trial of the question of fact before the jury was a fair one under correct rulings and instructions of the trial judge.

We do not purpose in this opinion to discuss the evidence. We have determined that for errors in the instructions, as hereinafter set out, the case must be remanded for a new trial, and the same questions of fact, under corrected instructions, will be again before a jury to answer. Under these circumstances, we desire to refrain, as far as possible, from a discussion of the merits of the cause.

There are, however, two questions of law raised by the appellee which deserve and must receive our attention before we pass to a discussion of the instructions, although, as indicated, we think that it is upon the error in these instructions that the case must finally turn.

In the first place, it is insisted by the appellee, that even if the law of Illinois, when the death of Brennan occurred, in July, 1899, and when this suit was begun, in January, 1900, recognized in his widow a cause and right of action for his death, because such right was given to her by the statutes of Mississippi, yet the act of May 13, 1903, entitled "An Act to amend Section 2 of an Act entitled 'An Act requiring compensation for causing death by wrongful act, neglect or default,' approved February 12, 1853," nullified (when it went into effect July 1, 1903) this cause or right of action—inasmuch as it had not previously matured into judgment.

Of course if this contention be well taken, it is immaterial whether or not the instructions were correct, for although there are no cross-errors assigned on the record, yet if the motion of defendant at the close of all the evidence to take the case from the jury, should, on the strength of

this contention, or on any other ground, have been granted, no error in favor of the defendant in the subsequent instructions could have been really injurious. The judgment actually rendered would be the only one proper or justifiable.

The Act of February 12, 1853, is a substantial copy of the English Statute of the ninth and tenth Victoria known as Lord Campbell's Act, and reads as follows:

"Section 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or person or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

"Section 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars; provided, that every such action shall be commenced within two years after the death of such person."

The act of May 13, 1903, which went into effect on the first of July following, was as follows:

"Be it enacted, etc., that section two of an act entitled 'An Act requiring compensation for causing death by wrongful act, negligence or default' be amended to read as follows:

"Section Two. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such

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action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of *Ten Thousand Dollars*. Provided: That every such action shall be commenced within *one* year after the death of such person; *Provided, further, that no action shall be brought or prosecuted in this State, to recover damages for a death occurring outside of this State, and that the increase from five thousand to ten thousand dollars in the amount hereby authorized to be recovered, shall apply only in cases when death hereafter occurs.*"

The italics mark the changes and additions made in the law by this Act of 1903.

It is contended by the appellee that this Act of 1903, although without express words of repeal, repealed, so far as any right to recover for a death out of the State is concerned, the Act of 1853, because of "a clear repugnance between the two laws," and because the "later statute revises the whole subject of the former one, and was intended as a substitute for it." Effecting such a repeal, and making no exception of pending cases or previously acquired rights of action, the later statute or amendment must be held, it is insisted, to apply to and put an end to them—a conclusion strengthened by the language of the proviso, that no such suit as the present shall be brought or *prosecuted* in this State.

This proposition of the appellee is not without plausibility, but there is more than one reason for holding it unsound. The first is that in the language of appellee's brief, "The right she (appellant) seeks to enforce was not created or given by the 'repealed' statute, but was given by the laws of the State of Mississippi." Whether or not such a right "granted by other States and not granted by the laws of Illinois," can be denied by the Legislature of this State and the courts of this State forbidden to recog-

nize its existence as an enforceable liability, given by the law of the sister State where the death occurs, it is not necessary for us to decide. Without deciding that it can, we have no intention or disposition to imply that it cannot, as to all such deaths occurring after the passage of the denying act, but we are very clear that as to deaths which had occurred at the time of the passage of such act, such a denial would be impossible. The Supreme Court of Illinois has announced the rule, commending itself by analogy and right reason, that any right of action which has occurred under the statute of a sister State of the Union will be enforced by the courts of Illinois, unless against good morals, natural justice, or the general interest of the citizens of the State in which the action is brought. *Chicago & E. I. R. R. Co. v. Rouse*, 178 Ill. 132. In the case cited it applied this rule to an action brought for a death caused in Indiana, the liability for which would (on account of our doctrine of fellow-servants) not have attached to the defendant under the statutes and law of Illinois, but which did attach under the statutes of Indiana. In upholding the right of the plaintiff to sue, the Supreme Court of Illinois quoted with approbation the language of the Supreme Court of Minnesota in a similar case, to the effect that the authorities fail to justify the position that to sustain such a statutory action the law of the forum and the law of the place where the right of action accrued must concur in holding that the act done gives a right of action. *Herrick v. Minneapolis & St. Louis R. R. Co.*, 31 Minn. 11.

It is apparent that in the case at bar the action is not brought under the statute of Illinois, but of Mississippi, otherwise the party plaintiff would have no standing. It does not need the amendment of the act of 1853 to defeat this action, if the right to bring it is to be considered "purely a creation of the '*Illinois*' statute."

But if it is conceded, as it must be, that it is the creation of the Mississippi statute, then under the authority above cited there was "*an accrued cause of action*" in *Illinois*, immediately on the death of the deceased. Such an ac-

crued cause of action, we think, created a vested right in the plaintiff in this cause. Any legal or equitable title to the present or future enforcement of a demand is a vested right according to the declaration of our Supreme Court. *Richardson v. Akin*, 87 Ill. 138. "There is a vested right in an accrued cause of action." *Lewis Sutherland on Statutory Construction*, sec. 671, citing *Norris v. Tripp*, 111 Ia. 115; *Tufts v. Tufts*, 8 Utah, 142; *Pinkun v. Eau Claire*, 81 Wis. 301; *Smith v. Louisville, etc., R. R. Co.*, 62 Mississippi, 510.

Appellee insists that the right was "inchoate," not "vested," because not in judgment, and cites *Van Inwegen v. City of Chicago*, 61 Ill. 31, where the court speaks of "inchoate rights," "rights not carried into judgment and so not executed," and afterwards apparently referring to the same class of "rights," describes them as "in their nature not vested, but remaining executory." Appellee cites also *County of Menard v. Kincaid*, 71 Ill. 587. But we think that these cases can be plainly distinguished from such a one as the present. The *County of Menard v. Kincaid* simply decided that the repeal of a statute giving certain officials power to lay out roads, by certain proceedings annulled all "inchoate" proceedings in the matter of such a road, which were not concluded; and *Van Inwegen v. The City of Chicago*, was a case arising under the repeal of a revenue law requiring insurance companies to pay a percentage of gross receipts into the city treasury as a tax imposition. The court held that a repeal of this law prevented the city from recovering in a suit afterward brought for a percentage of the receipts for a period before the law was repealed, saying: "It is unnecessary to argue the proposition that this right to sue for the percentage was not such a right as in legal parlance is termed vested." The language in every case is to be construed with reference to the facts of that case, and we do not think that the Supreme Court meant in this *Van Inwegen* case to say or imply that no "right" to enforce a liability, even when the liability is the correlative of some consideration given

or injury suffered by the claimant, could be held "vested," until it was in judgment. Such a doctrine would admit the destruction of property rights under contracts equally with claims under torts.

If the right of the widow in this case was, under the law of Illinois, vested at the death of her husband in Mississippi, no subsequent legislation could take it away. Subsequent legislation might perhaps prevent, in the case of such deaths in the future, any right depending solely on the Mississippi statute from becoming a right which could be enforced in the State of Illinois, but it could not shut the courts of Illinois to a claimant to whom they were open when the legislation was enacted. "Vested rights cannot be destroyed, divested or impaired by direct legislation. Their protection is one of the primary purposes of government. They are secured by the bill of rights and the constitutional limitations upon the exercise of the sovereign powers." Lewis Sutherland on Statutory Construction, section 671, and cases there cited.

But there are other reasons for not holding the act of May 13, 1903, retroactive. There is a general rule that no statute will be construed to operate retrospectively unless the intent that it shall do so is manifested by clear and unequivocal language. *Jimison v. Adams Co.*, 130 Ill. 558; *Gage v. Nichols*, 135 Ill. 128; *People v. McClellan*, 137 Ill. 352; *Fisher v. Green*, 142 Ill. 80; *Voight v. Kersten*, 164 Ill. 314; *Moore v. Chicago Guaranty Fund Soc.*, 178 Ill. 202; *In re Day*, 181 Ill. 73; *Richardson v. U. S. Mortgage & Trust Co.*, 194 Ill. 259.

Such language we do not find in this amendment. It does not purport, as claimed, to be a repealing act or a complete revision. Its principal objects seem to have been to increase the limit to damages allowed by the Illinois statute, and to shorten the time within which the actions could be brought. These were purely amendments; the further provision we are now discussing is new, neither amendatory of nor repealing any prior statutory provision, but introducing a hitherto unknown prohibition into the

law of Illinois. Such a provision we do not consider retrospective in its operation. We do not think the legislature so intended it.

In our opinion, therefore, both the intention and the power were lacking in the legislature to make this amendment of May 13, 1903, applicable to the case at bar. There may be aptly applied to it the language of Judge Brown in the Sixth Federal Circuit in *Osborn v. City of Detroit*, 32 Fed. Rep. 36: "Not only is there nothing in the act indicating that its operation was intended to be retroactive, but it was not even given immediate effect, as would almost certainly have been the case if it had been intended to operate upon actions already commenced, or causes of action theretofore accrued."

The second matter of law which appellee claims should dispose of this case, arises on the doctrine of the negligence of fellow-servants, as declared by the Supreme Court of the State of Mississippi.

It is contended that under the undisputed evidence there can be no doubt that Brennan and the defendant's employee Bell, by whose personal negligence it is charged that the death occurred, were fellow-servants, as that term is defined by the Mississippi court of last resort, and that it is therefore a matter of law that there can be no recovery in this case. Both in Illinois and in Mississippi the common law on this subject is supposed to govern except where, in Mississippi, it has been changed by the constitution in relation to railroad employees.

In Illinois the common law has been declared to be that "where a master confers authority upon one of his employees to take charge and control of a certain class of workmen in carrying on some particular branch of his business, such employee, in governing and directing the movements of the men under his charge, with respect to that branch of his business, is the direct representative of the master and not a mere fellow-servant, and all commands given by him within the scope of his authority are, in law, the commands of the master." *City of LaSalle v. Kostka*,

190 Ill. 130. It cannot be denied that there was evidence in the present cause tending to establish such a condition here, but it is contended that the Supreme Court of Mississippi has repudiated this doctrine as a declaration of the common law and established another as the true statement of it. Of course, all the presumptions with us are in favor of the accuracy of the exposition of the common law by the Supreme Court of Illinois. If, therefore, the law of Mississippi on this subject, where it is unaffected by statute, differs from the law of Illinois, it must logically be because the common law has there been incorrectly interpreted. If this can be established it may follow that the common law, as it prevails in Mississippi, is different from the common law as it prevails in Illinois, but this must be clearly demonstrated, or the contrary will be presumed. *Fortier v. The Pennsylvania Company*, 18 Ill. App. 260.

The appellee introduced in evidence certain opinions of the Supreme Court of Mississippi to establish its contention. We have studied them very carefully, and we are not satisfied that it is by them established that the language we have quoted from the *City of La Salle v. Kostka*, *supra*, is not the law of Mississippi.

It is undoubtedly true—these opinions show it—that in Mississippi the courts have given a more comprehensive effect to the “fellow-servant” doctrine than have some other States. Employees of the same master that in Illinois would not be held fellow-servants, have been there so held, but in *N. O., J. & G. N. R. R. Co. v. Hughes*, 49 Miss. 280, which seems to be the leading case which the later ones cited and introduced in evidence, follow and approve, the court says (page 289): “Nor would we undertake to say in advance that there might not be officers clothed with such special authority and filling such special relations to the company as that the corporation should be esteemed as present with them, commanding and acting so that it may be made amenable to subordinate servants. We throw out the suggestion, but without committal one way or the

other, in order to prevent the views here expressed from being carried beyond the range of their fair applicability."

In *Lagrone v. M. & O. R. R. Co.*, 67 Miss. 596, there is language which we find it not easy to reconcile with the Illinois construction of the common law, but so far as the case decides the facts before it (and this must be considered as the limit of its scope in indicating that Mississippi does not accept the Illinois construction), it does not contradict such construction. The negligence complained of was of one employe (of higher rank) who injured another by an inaccurate and careless blow of a hammer while both were engaged in straightening a bent fish-bar. The court says: "We might with safety and propriety decline to say more than that appellant's declaration shows by unequivocal statement that the injury complained of was the result of the negligence of the section master at a time when he was simply engaged in manual labor with appellant. Both were engaged at that time in the ordinary work of simple day laborers in track repairing. The appellant was holding and the section master was striking a bent fish-bar with a view to straightening it for its purposed use. It seems to us that this plain and brief recital by every rule of law is ample to demonstrate that appellant's injury was the effect produced by the negligent acts of a fellow-servant."

In the case at bar counsel for appellee says in his brief: "We feel that this question is one of law and not of fact. If it is one of law, the defendant is not liable. If one of fact, the jury has decided the question in the defendant's favor."

As we have indicated, we do not consider that the question involved is, under the evidence, one of law. It is one of fact, and it becomes therefore material for us to consider whether the verdict rendered by the jury was so rendered under accurate instructions from the court.

There is an argument made by appellant that improper evidence was admitted by the trial court of the proceedings in a certain suit brought by the appellant in the Circuit Court of Warren County, Mississippi, against the Vicksburg Railroad, Power & Manfg. Co., for this same death,

and of the result. But this can be sufficiently considered in connection with one of the instructions hereinafter discussed. The appellant requested five instructions, which were numbered from I to V, and given. They cover various phases of the case presented by the evidence, and although of course we are not called upon by any assignment of error here to pass on them, yet since the case will probably be retried, it is not improper for us to say that they seem to us to state the law accurately.

The appellee then requested twenty-three instructions, sixteen of which, numbered from VI to XXI, inclusive, were given, and the remaining seven, numbered from XXII to XXVIII inclusive, were refused.

It is not necessary for us to say anything of those refused, as there are no cross-errors assigned, and they are not really before us for consideration. Of the instructions from VI to XXI, there are seven which are not attacked in the argument of appellant. They are numbered IX, X, XII, XIII, XIV, XIX and XXI, and may also be dismissed from further consideration. We see no objection to them. Instruction XXI leaves to the jury the question of fact whether the injury to the deceased was caused solely by the negligent act of a fellow servant, and taken in connection with instruction IV may be considered correctly to state the law concerning the doctrine of an injury from the negligent act of a fellow-servant, as we understand it to exist in Mississippi.

The instructions complained of are VI, VII, VIII, XI, XV, XVI, XVII, XVIII, XX.

Of these we think one at least—XVI—is fatally erroneous; and another—XV—so likely to have been misleading as to make it very doubtful whether the jury considered the matter of which it treats from a correct standpoint. Some of the others, if not all, are properly subject to criticism, to which we shall advert after discussing XVI and XV.

Instruction XVI is as follows:

“The court instructs the jury, as a matter of law, that

the defendant was not required to guard Brennan from dangers which the defendant did not create, or of the existence of which the defendant had no knowledge or means of knowledge in the exercise of ordinary care on its part."

This instruction might well be understood to tell the jury that they should find the defendant not guilty (a) if they found that the fatal current which killed Brennan was not of its creation, and they should likewise find it not guilty if (b) they found that it had in the exercise of ordinary care no knowledge or means of knowledge that that current would be turned on while deceased was on the pole. It is manifest that the first of these alternatives does not state the law. It is quite probable that the conjunction "*and*"—not "*or*" as it appears, nor "*nor*" as counsel for appellee suggest—was the word which the learned trial judge really meant to use to connect the two clauses of the instruction. If the defendant had neither created the danger nor, in the exercise of the care required of it, had any knowledge or means of knowledge of its existence, then the conclusion that it was not under obligation to protect Brennan from it would follow; but as it stands the instruction is plainly bad. And we think, moreover, that to avoid misleading the jury, it would have been better—even had the instruction taken on otherwise the proper form—for the court to have indicated in it that the care required was to be measured by the usual and known risks of the employment. For the error contained in this instruction the judgment should, in our opinion, be reversed and the cause remanded for a new trial. We are of opinion that in a case of such conflicting testimony it is an error which cannot be overlooked.

Instruction XV is as follows:

"The court instructs you that if you believe from the evidence in this case the plaintiff has been fully compensated for the death of James Brennan, then you are not at liberty to assess further damages against the defendant in this case."

Counsel for appellant contends that this instruction was

erroneous as having no foundation of any kind in the evidence. They also contend that the evidence of the verdict and judgment in favor of the plaintiff against the Vicksburg Railroad, Power & Manufacturing Company for \$16,480, in the Circuit Court of Warren County, Mississippi, and of the execution issued upon said judgment, should have been excluded, although connected with testimony showing a sale of the said judgment by the plaintiff to one H. K. Johnson, of Vicksburg, for \$3,500. As we understand their argument, they deny that this judgment and its sale and the reception by Mrs. Brennan of \$3,500 from such sale can properly have any effect whatever on the verdict of the jury in the case at bar. To this proposition we cannot agree. We think that these matters may be proven and that the reception of the \$3,500 on the sale of the judgment can be properly considered by the jury on the question of damages.

The plaintiff's claim arises under the statute of Mississippi, not under that of Illinois, as has been indicated. The limit provided for in the statute of Illinois does not apply. But the action being for the "damages of every kind to the decedent and all damages of every kind to all parties interested in the suit" (such persons being the widow and the four children mentioned in the declaration), it is, in our opinion, proper and relevant for the defendant to prove all "compensation" which has actually been received from any person, if such there be, jointly a wrong-doer with itself (it should be held itself to be a wrong-doer), in reduction of the damages for which it might otherwise be deemed liable. We think, moreover, that although neither the reception of such money directly from the other wrong-doer, nor the securing from the sale of a judgment claim against such other wrong-doer to a third person, a portion of the amount of such judgment, would, in the absence of a release or of an accord and satisfaction to or with such other wrong-doer, discharge or release the defendant except *pro tanto*; yet such a sale and the proceeds of it to the plaintiff, equally with such direct reception, can be properly put in evidence to effect such a reduction of damages.

It is certain that the legislature of Mississippi in the statute in question did not contemplate that the widow and next of kin should be more than once compensated in damages for the injury caused them by the death, and it is equally certain that it was purely on account of the death of her husband and through the means of a judgment obtained under the statute against a person adjudged either solely or jointly liable for it, that such money has been secured by the plaintiff as was paid to her by Harry Keen Johnson.

We think it consistent with justice and right reason, and in accord with the decisions of our Supreme Court, that the evidence complained of should have been admitted and a proper instruction on the subject given. *City of Chicago v. Babcock*, 143 Ill. 358; *Wagner v. Union Stock Yards & Transit Co.*, 41 Ill. App. 498; *City of Roodhouse v. Christian*, 158 Ill. 137; *West Chicago St. R. R. Co. v. Piper*, 165 Ill. 325.

But this instruction under discussion is open to grave objections. Carefully analyzed and all intendments made in its favor, it may be that the instruction does not state an incorrect rule. There is nothing in the evidence from which the jury could find that the plaintiff had been "compensated for the death of James Brennan," except the judgment against the Vicksburg Company and its sale, and if the proceeds of these did amount to the full damages which the jury believed from the evidence the plaintiff, suing as she did for the benefit of herself and her children, was in that capacity entitled to receive, then the jury should not have allowed her to recover anything more, if they also believed from the evidence that the Vicksburg Company was jointly with the defendant responsible for the death of her husband.

But in our opinion an instruction on this subject, in order not to be misleading, should be much more definite and precise in its language and in its application to the facts of this case. It should include, in some form, the proposition that while such proceeds of the Vicksburg judgment as the

plaintiff had received could be considered in reduction of damages, it did not follow that the defendant had been released or discharged from all liability—if such liability existed—and it should more clearly include this material factor of the correct doctrine in relation to the matter, namely, that the condition of giving the money obtained by the plaintiff by means of the Vicksburg judgment the effect of reducing damages in this case, was a contemporaneous finding that the Vicksburg Company and the defendant were joint tort-feasors. It is apparent that a mere gratuity or benevolence from an innocent party would not be “compensation.”

It is not necessary for us to discuss the other instructions attacked in detail. It is unlikely that they will be offered in their present form at another trial. The criticism, in our view, which may be justly made of them is not, as appellant urges, that there is no evidence on which to base any theory of assumed risk or contributory negligence to be submitted to the jury, but that they might have tended to mislead the jury by ignoring the theory of plaintiff, which there was also evidence tending to sustain, that the deceased was acting under specific orders from the defendant by its vice principal to do the specific work at the particular place and at the particular time which was dangerous, and that therefore he could not be held to have assumed the risk unless the danger was so apparent that a person of ordinary prudence would have refused to obey the orders.

• The same fault in this regard is chargeable to instructions VI, VII, VIII, XI, XVII and XVIII.

Instruction XX is criticised by appellant as practically condemned by the Supreme Court in *Illinois Steel Co. v. McFadden*, 196 Ill. 344. It bears a close resemblance to an instruction held to have been properly refused in that case, and should be modified if offered again, but we should not regard it as containing reversible error by itself.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Royal Trust Company v. Gustave A. Overstrom.

Gen. No. 11,980.

1. **ASSUMPSIT**—*when does not lie.* Assumpsit does not lie to recover the value of personal property in the hands of the defendant as the property of another.

2. **PREPONDERANCE OF EVIDENCE**—*when instruction upon subject of, not erroneous.* The following instruction while held to some extent inaccurate, is yet adjudicated as not constituting reversible error:

“The court instructs the jury that the plaintiff in this case sues in the place and stead, and for the benefit of the American Engineering Works, and in order to recover, he must prove by a preponderance of the evidence an agreement on the part of the defendant to purchase certain shares of stock in the Overstrom Concentrating Co. from the American Engineering Works, or to pay that company for certain stock purchased by it for him. And if you believe from all the evidence in the case that the defendant did not so agree with the American Engineering Works, then your verdict should be for the defendant.

“The court instructs the jury that if you believe from all the evidence that the evidence is evenly balanced, or preponderates in favor of the defendant, then you should find for the defendant.”

Action of assumpsit. Error to the Circuit Court of Cook County; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 1, 1905. Rehearing denied May 15, 1905.

ALDEN, LATHAM & YOUNG, for plaintiff in error.

SCOTT, BANCROFT, LORD & STEPHENS, for defendant in error.

MR. JUSTICE BROWN delivered the opinion of the court.

The plaintiff in error, as the trustee in bankruptcy of American Engineering Works, sued the defendant in error in assumpsit in the Circuit Court of Cook County. The declaration contained the common counts and a special count alleging that the American Engineering Works, at the request of the defendant, purchased for and delivered to the defendant ten shares of stock in the Overstrom Concentrator Company, and the defendant in consideration thereof promised to pay \$1,675 to said American Engineering Works.

The defendant pleaded the general issue, filing therewith

an affidavit of a meritorious defense to the whole of plaintiff's demand, and thereafter a plea of set-off, alleging that the American Engineering Works was indebted to the defendant in the sum of \$400 for royalties received by said American Engineering Works on patents for concentrating tables owned by defendant and by him authorized to be used by said Engineering Works on the agreement by it that one-half the royalties received by it be paid to defendant.

The cause being submitted to a jury on the issues thus made up, the jury found a verdict for the defendant and assessed the defendant's damages on the plea of set-off at \$189.97. A motion for a new trial was made by the plaintiff and overruled by the court. Judgment was thereupon entered for the defendant and against the plaintiff upon the verdict, to reverse which judgment a writ of error has been sued out from this court. The errors assigned and argued and therefore to be noticed are that the verdict was contrary to the evidence and that the instruction given by the court to the jury was erroneous.

The testimony was sharply conflicting.

For the plaintiff, the president of the American Engineering Works, Mr. Billin, testified that Mr. Overstrom authorized him to buy stock in the Overstrom Company for any amount up to \$200 a share, and that he bought it for the sum sued for and delivered it to Mr. Overstrom. He testified also that he did this for the American Engineering Works, and by implication, at least, that Overstrom knew he was so dealing with the Engineering Works, for Mr. Billin says Overstrom promised "that when he got his dividends from the Overstrom Concentrator Company he would arrange that part of that would be turned back to the American Engineering Works in payment." Mr. Hews, a representative of the plaintiff, testified that Mr. Overstrom told him "the account would be paid in full."

On the other hand, Mr. Overstrom, the defendant, denied making any request of Mr. Billin or the American

Engineering Works to buy stock, denied that he knew the certificates had been bought until Billin informed him, and testified that some of the certificates were given to him by Billin without his asking for them a day or two before the trustee in bankruptcy was appointed for the Engineering Works, and the rest two or three weeks afterward, without any request for or mention of any money, and gave his version of the conversation with Mr. Hews as follows: "At the time I got that statement I spoke with Mr. Hews about settling for that stock. I told Mr. Hews that I would never pay any \$165 a share for stock that I could buy for \$50 or \$60. And then Mr. Hews said, 'Well, won't you give the stock back to us?' I said, 'Well, you pay what is due me of the foreign business and I will give you the stock.'"

The defendant in error also produced a witness, H. L. Keen, to confirm other portions of his own testimony, not above given, concerning Mr. Billin's objects and proceedings in buying the stock in question, and Keen testified that Mr. Billin told him he had bought the stock to protect his interest in a controversy then arising between the Overstrom Concentrator Company and the American Engineering Works, because the Overstrom Concentrator Company was incorporated under the laws of Montana and a minor stockholder had a large right under such incorporation.

There was no dispute as to the indebtedness from the American Engineering Works to Overstrom. It was admitted in open court that outside of the stock transaction there was \$189.87 so due.

It is evident from the above statement, without going further into the details of the testimony, that apart from the alleged error in the instruction, the question in this case is one of fact, depending on the credibility of witnesses. It was, therefore, for the jury, who saw and heard the witnesses—not for us. If the defendant in error and his witnesses are to be believed in preference to the plaintiff in error, then we do not think there was any cause of action made out in behalf of the American Engineering Works or

its trustee, despite the fact urged by plaintiff in error, that Overstrom has in his possession certificates of stock for which he has paid nothing. His testimony, above quoted, concerning his conversation with Mr. Hews, is not sufficient to prove the value of the stock even, but beyond this, evidence of value of the stock would not in this action be sufficient to base a judgment on in favor of the plaintiff.

If the defendant has stock in his hands belonging to somebody else, the law affords a remedy therefor; but it is not the remedy of a suit in assumpsit for money paid for him at his alleged special request. Nor are the other common counts in assumpsit a sufficient basis for such a remedy.

Of course, as we have indicated, the evidence offered in behalf of the plaintiff would have justified the judgment asked in its behalf, but we cannot interfere with the verdict of the jury based upon their apparent belief in an entirely different state of facts. •

The instruction complained of is as follows:

“The court instructs the jury that the plaintiff in this case sues in the place and stead, and for the benefit of the American Engineering Works, and in order to recover, he must prove by a preponderance of the evidence an agreement on the part of the defendant to purchase certain shares of stock in the Overstrom Concentrator Co. from the American Engineering Works, or to pay that company for certain stock purchased by it for him. And if you believe from all the evidence in the case that the defendant did not so agree with the American Engineering Works, then your verdict should be for the defendant.

The court instructs the jury that if you believe from all the evidence that the evidence is evenly balanced, or preponderates in favor of the defendant, then you should find for the defendant.”

We do not think this instruction erroneous. It might perhaps have been more carefully drawn to avoid any possibility of its proving misleading, but we do not think that in its fair meaning, as it must be supposed it was probably understood by the jury, it declares either that Mr. Billin's agreement on behalf of the company would not bind the company, or that an agreement could not be by the jury

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inferred from all the facts and circumstances testified to surrounding the purchase of the stock and its delivery to Overstrom, if they thought such facts and circumstances as they believed took place justified such an inference. The language of Judge Wall in the City of Champaign v. Forrester, 29 Ill. App. 120, cited in the brief for defendant in error, seems very applicable here. "Possibly the jury, on a careless reading, might give it the construction contended for; and if defendant was apprehensive that the jury might so misunderstand, it was its privilege to ask another instruction, making the point clear."

As we think that there is no reason in the points made and argued in this court for interfering with this judgment, we shall affirm it; but we do not wish to be understood to approve of the *form* of this judgment against a trustee in bankruptcy on a plea of set-off. It seems to us irregular.

Affirmed.

Jacob A. Hey v. Fred Hawkins.

Gen. No. 11,944.

1. REMARKS OF TRIAL COURT—*how objection to, preserved.* In order to preserve for review the question as to the propriety of remarks of the trial judge, it is essential that they be excepted to; mere exceptions taken to them as constituting rulings upon evidence are not sufficient.

2. EXPERT—*when value need not be proved by.* The value of an article in almost universal use need not be established by expert testimony.

3. MEASURE OF DAMAGES—*for injuries to horse.* The cost of attempting to cure a horse injured through the carelessness of the defendant, as well as its value in the event of having finally to kill such horse as useless, is proper by way of damages.

Action commenced before justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 1, 1905.

EDWARD U. FLIEHMANN, for appellant.

EDDY, HALEY & WETTEN, for appellee; CHARLES H. PEGLER, of counsel.

MR. JUSTICE BROWN delivered the opinion of the court.

Fred Hawkins, the appellee, owned a horse which while harnessed to a coal team with two other horses was injured by the carelessness or wilfulness of a servant of the appellant, who drove a wagon over its front hoof.

The appellee called a veterinary surgeon and had the horse treated for the injury. About three months afterward the appellee brought suit against appellant before a justice of the peace. The defendant made default and a judgment was rendered for \$125. The defendant afterward appealed to the Circuit Court, and there on a trial a jury assessed the plaintiff's damages at \$188.50. There was evidence before the jury that the horse was worth \$150; that the appellee had paid \$40 for his keep for four months, during which he was useless, and that at the end of four months had sold him for \$1.50 to a horse killer. The verdict of the jury was, therefore, evidently the sum of the \$150 and the \$40, less the amount received from the killer.

A motion for a new trial was made and overruled, and judgment entered on the verdict, from which judgment the defendant appealed to this court.

Here he has assigned for error the allowance of improper and the refusal of proper evidence, the denial of the defendant's motion for a new trial, and that the verdict was contrary to the evidence. In his argument he urges only that improper evidence was admitted and that the court made improper remarks in the presence of the jury which may have prejudiced them. There is no assignment of error covering this last objection, but if there were there would be nothing to sustain it. There was no exception taken to the remarks which are complained of, except as they were rulings on the admission of evidence, which will be considered separately. Nor was there anything said by the court that we can see was prejudicial to defendant. The remark

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especially objected to was made in a ruling in favor of appellant on the admission of evidence.

As to the admission of improper evidence, two points are made by appellant.

First, that persons not qualifying themselves as experts were allowed to testify to the value of the horse. This position is not well taken. Each one of the witnesses knew something of the value of horses, according to his uncontradicted statements, and the evidence of such a person is competent. Judge Caton in 1862 said: "Every one is presumed to have some idea of the value of property which is in almost universal use, and it is not necessary to show that a witness is a drover or a butcher before he is allowed to give an opinion of the value of a cow." *Ohio & Mississippi R. R. Co. v. Irvin*, 27 Ill. 178. This language applies as well to a horse as to a cow, and we know of no authority to the contrary, but of many which confirm it. For example: *Ohio & Mississippi Ry. Co. v. Taylor*, 27 Ill. 207; *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302; *Chicago City Ry. Co. v. T. W. Jones Transit Co.*, 92 Ill. App. 507.

Appellant's second point is that the jury should not have allowed, in fixing damages, anything beyond the value of the horse. They should not have added the amount paid for his keep during the four months that the appellee was endeavoring to cure him. This objection to the judgment has no better foundation than the other. Anything which appellee paid for the keeping of a horse rendered useless by the fault of the appellant, was a part of the appellee's damages, and unless and until he was reasonably convinced that he could not cure the animal, he was bound to make expenditures for that purpose, if in good faith and prudent judgment he thought that this might diminish the ultimate damages. He could have properly demanded and recovered such expenditures from the appellant as well as the expense of keeping.

Counsel for appellant says that Doctor Baker, a veterinary surgeon, "notified the plaintiff *right after the injury* that the horse was useless and that he ought to shoot him."

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If this were the evidence, the case would be different, for the plaintiff was bound to exercise good faith and reasonable discretion in not "making unreasonable expenditures in the hope of mitigating the injury." But the statement must come from a misconception of the testimony of Mr. Hawkins. The fair inference from that testimony is not that Dr. Baker told him "right after the injury" that he might as well kill the horse, but that he treated the horse for four months, tried to cure it for that length of time in the expectation it would get better and then pronounced it incurable, and said to appellee, "You might as well kill him."

Under these circumstances the great weight of authority is that the appellee is entitled as a part of his damages to his reasonable expenditures for the keeping and indeed for the attempted curing of the animal. *Travis v. Pierson*, 43 Ill. App. 579; *Atwood et al. v. Boston Forwarding & Transfer Co.*, 185 Mass. 557, and cases therein cited; *Sedgwick on Damages*, 8th edition, section 438.

There is no error in the record, and the judgment of the Circuit Court is affirmed.

Affirmed.

Milton J. Foreman, Receiver, et al., v. Defrees, Brace & Ritter.

Gen. No. 11,677.

1. APPEAL—what does not confer right of. An order as follows:

"The Assets Realization Company has this day entered its appearance in this cause and it is by the court ordered, etc., that the court, without the consent of said company, retain jurisdiction over the said Assets Realization Company for the purpose of making such further orders and decrees in the premises as may be necessary to enforce a full compliance by the said company with the terms of its bid so accepted by this court,"—

held not to confer upon said Assets Realization Company the right to appeal from an order entered upon the receiver in the cause requiring him to make certain disbursements.

2. APPEAL—when receiver cannot. A receiver has no right to ap-

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peal from an order of court directing him to make disbursements. It is only from orders affecting his compensation or from orders refusing to allow items in his account that a receiver may appeal.

3. APPEAL—*when court will dismiss, sua sponte.* The Appellate Court will dismiss *sua sponte* an appeal taken by a receiver as to a matter with respect to which he has no right of appeal, jointly with another not a party to the record and having no right of appeal.

Petition in receivership proceeding for allowance of fees, etc. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Dismissed. Opinion filed April 18, 1905. Rehearing denied May 5, 1905.

S. W. SWABEY, for appellants.

JOHN G. CAMPBELL, for appellee; DEFREES, BRACE & RITTER, of counsel.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

In a chancery cause pending in the Circuit Court, wherein The People of the State of Illinois ex rel., etc., was complainant, and the Mechanics and Traders Savings, Loan & Building Association was defendant, appellees filed a petition alleging that they, under an employment by the defendant, had rendered services to and expended money for the defendant in resisting the application for the appointment of a receiver for and the dissolution of said corporation, and praying that an order be entered in said cause allowing their claim and directing the receiver of the defendant to pay the same out of any moneys in his hands, or which might come into his hands as such receiver. Milton J. Foreman, receiver of the defendant, filed an answer to the petition; proofs were heard by the court and a decree entered in the cause, which found that the petitioners were employed by the defendant to resist the application for the appointment of a receiver, etc., and under such employment had rendered services which were of the reasonable value of \$3,725, and had necessarily paid out in and about said defense \$533.67, and ordered that the receiver pay to the petitioners, in due course of administra-

tion, out of any money in his hands or which should come into his hands belonging to said association, the sum of \$4,258.67. From this decree, "Milton J. Foreman, Receiver, etc., and Assets Realization Company," prayed, were allowed and perfected their joint appeal to this court. The Assets Realization Company was not a party to the suit in which the decree was entered. It was merely the purchaser of the assets of the defendant company. In the order confirming the sale of the assets of the defendant to that company, appears the following: "The Assets Realization Company has this day entered its appearance in this cause, and it is by the court ordered, etc., that the court, with the consent of said company, retain jurisdiction over the said Assets Realization Company for the purpose of making such further orders and decrees in the premises as may be necessary to enforce a full compliance by the said company with the terms of its bid so accepted by this court."

The order did not make the Assets Realization Company a party to the decree nor entitle it to the right to appeal therefrom. In *L. E. & St. L. R. R. Co. v. Surwald*, 147 Ill. 194, a suggestion was made on the record that since the commencement of the suit, the defendant corporation had become merged in another corporation and the latter corporation appealed. The Appellate Court dismissed the appeal, and upon a further appeal to the Supreme Court the order and judgment of the Appellate Court was affirmed. In the opinion in that case it was said (p. 195) that, "No legal steps were taken by the appellant to be made or substituted as a party defendant in the proceedings. If it had become, pending the litigation, the successor in interest of the defendant, that fact should have been disclosed to the court in the appropriate way, and then the proper order might have been had making it a party. (*Scott v. Milliken*, 60 Ill. 108; *Mercantile Ins. Co. v. Jaynes et al.*, 87 Id. 199; *Lawrence v. Lane*, 4 Gilm. 354.) The mere suggestion that since the commencement of the suit the defendant had become merged in appellant corporation, was not sufficient to make the latter a party so as

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to entitle it to effect an appeal. "The right to an appeal is purely statutory, and no statute exists, of which we are aware, that authorizes an appeal by a person not a party to the suit." *Hesing v. Attorney General et al.*, 104 Ill. 295; *Rorke v. Goldstein*, 86 Id. 568."

Nor is the order appealed from, one from which the receiver of the Building & Loan Association has any right to appeal. He was an officer of the court. The assets of the corporation were under the control of the court and he as receiver had no personal interest in the question whether the assets in his hands should go to the appellees or to his co-appellant. It is only from orders affecting his compensation or from orders refusing to allow items in his account that a receiver may appeal. *Haigh v. Carroll*, 197 Ill. 193; *Stevens v. Hadfield*, 178 Id. 532; *Sutton, Receiver, v. Weber*, 100 Ill. App. 360.

In *Chicago Title & Trust Co., Receiver, v. Caldwell*, 58 Ill. App. 219, as in this case, the bill was to dissolve a corporation. The receiver of the corporation appealed from an order allowing a claim against the corporation and ordering that it be paid *pro rata* with the claims of other general creditors, and the court dismissed the appeal at the personal costs of the appellant. In the opinion in that case Mr. Justice Gary said: "The point has not been made by counsel for the appellee, but we cannot sanction even by silence the idea that a receiver may set up in opposition to the court his theory of how the assets shall be disposed of."

There is in this case no formal motion to dismiss, but we are disposed to follow the precedent established by the case last cited, and of our own motion dismiss the appeal of both appellants.

Appeal of both appellants dismissed.

Chicago Union Traction Company v. Frederick Theorell.**Gen. No. 11,576.**

1. **SCAFFOLD**—*duty of master to furnish reasonably safe, defined.* It is not the duty of a master to furnish a scaffold to his servant which is reasonably safe for all uses and purposes; it is the duty of such master to furnish a scaffold that is reasonably safe for the uses and purposes for which it is required and intended.

2. **SCAFFOLD**—*how question of safety of, determined.* In determining whether a scaffold, platform or other structure is reasonably safe for the uses and purposes for which it is furnished and intended, the court will consider the structure itself, the uses and purposes for which it is required and intended, the length of time its use will be required, by whom it is to be used or occupied and the kind and amount of work to be done thereon.

3. **SCAFFOLD**—*what does not necessarily render, unsafe.* A scaffold may be reasonably safe notwithstanding it may not have been provided with a railing.

4. **ASSUMED RISK**—*when doctrine of, applies.* Where a defect is so plain and obvious to the senses that in the exercise of ordinary care an employee would discover it, and he continues in the employment without complaint and without any assurance by the master that the defect will be repaired or the danger removed, he assumes the risk arising from it.

Action on the case for personal injuries. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1903. Reversed. Opinion filed May 5, 1905.

Statement by the Court. This is an appeal by the defendant from a judgment for \$25,000, recovered against it by appellee in an action on the case for personal injuries. The declaration alleged that the defendant had a certain elevated railroad and was constructing coal bins near to said road, the bottoms whereof were on a level with the tracks of the railroad and fourteen feet above the ground; that the plaintiff was employed by the defendant to work on said coal bins; that the defendant negligently, etc., permitted an open space to remain between said track and said coal bins without guards, etc., to prevent plaintiff from falling through such open space, and that while so employed

and while exercising due care, etc., plaintiff was suddenly precipitated and thrown through said open space down to the ground and thereby sustained the injuries complained of.

The evidence shows that the elevated railroad structure was erected before the building of the coal bins was begun. The railroad structure consisted of posts which supported cross-beams upon which longitudinal girders were placed, upon which sawed ties twelve feet long were laid six inches apart. Upon these ties iron rails four feet eight and one-half inches apart were laid equidistant from the outer ends of the ties. Upon the ties, at either end, were fastened guard rails which consisted of planks four inches by ten, laid flush with the ends of the ties. To support the coal bins a framework of posts and beams was erected. Upon the beams, timbers, six inches thick and fourteen inches high, were placed running parallel with the guard rails. These timbers formed the sills of the coal bins. Upon them the floor of the bins was laid and they supported the upright posts to which were fastened the planks which formed the sides of the bins. The top of the sills was two inches above the top of the guard rail. The distance between the guard rail of the railroad and the sills of the coal bins was, according to the testimony of plaintiff's witnesses, eighteen inches, and according to the testimony of defendant's witnesses, fourteen inches. Each coal bin was sixteen feet long and six feet high. The frame of a bin consisted of a sill on each side, upon which were set three posts. To secure a post to the sill a bolt passed through the sill from top to bottom, the upper end of which was fastened to the lower end of the post. On the top of the posts were placed the plates which carried the rafters.

The plaintiff was a carpenter and had worked at his trade twenty years before the accident. He took no part in erecting the framework, built to support the bins, but had been engaged in putting up the framework of the bins for four or five weeks, according to his testimony, or from six to seven weeks, according to the testimony of defendant's witnesses. His work had been, with the aid of another car-

penter, to set up the posts, fasten them to the sill, plumb them and secure them in position. Other carpenters nailed to them the planks which formed the sides of the bins. He had taken part in setting up the frames of more than sixty bins before the accident. Bins were built on each side of the railroad. On the outside of the bins, on the sides away from the railroad, the carpenters built scaffolds. The top of the railroad structure was used by the carpenters as a scaffold for their work upon the inside sides of the bins. Upon it were placed the lumber and other materials used in building the bins and upon it the carpenters framed the timbers which went into the frames of the bins. In putting up the posts the carpenters stood either on the structure built to support the bins, or upon the guard rail, ten inches broad, which was at the outer edge of the railroad structure, or on both, and the carpenters when nailing the planks to the framework of the bins stood on the guard rail.

Just before the accident plaintiff was on the top of the railroad structure, between the rails, engaged in fitting a bolt to a post. He heard his foreman, who was on the ground, call out to him, "Andy, come here," and went out to and upon the guard rail. His own testimony in chief as to what then occurred was as follows:

"When I heard my foreman call I went right straight out to hear what he said, and I don't know, so soon I got out there I lost my balance. I lost my balance and fell down and that is the last I know of."

On cross-examination, as follows:

"Q. You said you became overbalanced? A. I just lost my balance, my feet—

"Q. Did you become dizzy, was that it? A. No, I couldn't remember that—when I got there it was just about—I don't know. I just lost my balance and my feet went under me and that is all I can tell.

* * * * *

"Q. Well, the truth of the matter is, that you don't remember what made you fall? A. No, I really—I know I can't tell about that because—all that I can tell is that it was pretty windy that day and when I got out there you know I just lost my balance and dropped between that."

The plaintiff sustained exceedingly severe injuries which rendered him practically helpless up to the time of the trial, and from the evidence it would appear that there is little ground to hope that he will ever be able to do any kind of work.

JOHN A. ROSE and LOUIS BOISOT, for appellant; W. W. GURLEY, of counsel.

THEODORE G. CASE and JOHN T. MURRAY, for appellee; A. W. BROWNE, of counsel.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

The plaintiff was in the service of the defendant and the law imposed upon the defendant the duty to use reasonable care to furnish the plaintiff a reasonably safe place to work. The defendant may be regarded as having furnished to the carpenters employed to erect the coal bins, the elevated railroad structure as a scaffold to be used in such work. Considering the top of this structure as the floor of the scaffold so furnished, the evidence shows that it was twelve feet wide, that its floor was made of flat ties placed six inches apart through which it was not possible for a man to fall. It was a safe place to put material required for the bins and for men to work upon in framing and fitting the lumber and other materials used in the construction of the bins.

The contention is, that it was unsafe and dangerous because there was a space eighteen inches broad between the outer edges of the guard rails and the adjacent sides of the sills of the coal bins. The duty of the defendant was not to furnish a scaffold or platform that was reasonably safe for all uses and purposes, but to furnish a scaffold or platform that was reasonably safe for the uses and purposes for which a scaffold was required and for the use which was intended to be and was made of it by the plaintiff and other employees employed by the defendant in the work of erecting the coal bins in question.

In determining whether a scaffold platform or other structure is reasonably safe for the uses and purposes for which it is furnished and intended, we must consider the structure itself, the uses and purposes for which such structure is required and intended, the length of time its use will be required, by whom it is to be used or occupied and the kind and amount of work to be done thereon.

That a veranda of a hotel, apartment house, or private dwelling, any considerable distance above the ground, which is not enclosed by a railing or balustrade on the sides away from the building and has a space eighteen inches broad between the floor of the veranda and the building, would not be a reasonably safe veranda is certain. Such a veranda is a permanent structure, intended for permanent use; intended to be used and occupied in the evening as well as in the daytime, and by children as well as by adults.

If a man intends to use the flat roof of his house for a summer garden he must enclose it with a balustrade to make it reasonably safe for that purpose; but if a new roof is required and he employs men to put it on, he would not be required to enclose his roof with a railing in order to make it a reasonably safe place for the men to work in putting on the new roof.

A scaffold or platform was required in this case on the side of a coal bin next to the railroad solely for the plaintiff and the carpenter who worked with him, to stand on while setting up the framework of a bin on that side, and for the other carpenters to stand on while nailing to the framework the planks which formed that side of the bin. A bin was sixteen feet long and six feet high. Plaintiff and one other carpenter in about thirty days, according to the testimony for the plaintiff, or in about forty days, according to the testimony for the defendant, framed and put in place the framework of more than sixty bins, which would amount to one-half or at most two-thirds of a day for each bin and only one-half of this work was done on the side of the bin next to the railroad. Two carpenters would require but an hour or two, to nail on planks to cover a space

of sixteen feet by six, so that all of the work to be done on the side of a coal bin next to the railroad, for which alone a scaffold was required, could be done by two carpenters in less than one day.

Plaintiff and the other men employed by the defendant to work on the coal bins were experienced carpenters and men of full age. Considering the top of the railroad structure as the floor of a scaffold, the scaffold furnished was, as has been said, twelve feet broad with a floor through which a man could not possibly fall and at its outer edge, the edge next to the coal bin, was a plank ten inches wide. The space between the plank and the sill of the coal bin was at most eighteen inches, half a pace broad, and the one but two inches higher than the other. A carpenter in setting up the framework of a bin could without inconvenience or danger stand with one foot on the guard rail and the other on the sill of a coal bin. A carpenter in nailing planks to the side of the bin could, without inconvenience or danger, stand upon the guard rail, eighteen inches away from the sill. Indeed, if the scaffold had extended to the sill a carpenter in nailing planks to the side of the bin would, for his own convenience, stand at least eighteen inches away from the sill. The top of the railroad structure afforded a safe, sufficient and convenient floor or scaffold for the carpenters to stand upon while doing all the work required to be done in putting up the side of the scaffold next to the structure. The plaintiff was not injured by the giving away of the scaffold, nor even by falling from it while directly engaged in work upon the coal bin. He fell by going to the outer edge of the guard rail to answer an inquiry of his foreman. Such an accident might have happened upon any scaffold which was not enclosed by a railing.

It is a matter of common knowledge that the scaffolds on which bricklayers, painters and carpenters work are not enclosed by railings, nor is a railing necessary to make a bricklayer's scaffold reasonably safe for a bricklayer, a painter's scaffold or staging reasonably safe for a painter, or a carpenter's scaffold reasonably safe for a carpenter.

These considerations and others that might be stated lead us to the conclusion, that considering the top of the railroad structure as a scaffold, furnished by the defendant to the plaintiff, such structure must be regarded as reasonably safe, and the defendant cannot be held guilty of negligence in furnishing the same, or in failing to furnish to plaintiff another or different scaffold.

To the contention that the defendant negligently permitted the guard rail to remain covered with grease and oil and that by reason thereof the plaintiff slipped and fell, it must be answered, that there is no such charge of negligence in the declaration, nor is there any evidence in the record tending to show that the greasy condition of the guard rail, if it was greasy, caused or in any manner contributed to the fall of the plaintiff.

There is another view to be taken in the case, which is also conclusive against the plaintiff's right of recovery. The fact that there was an open space between the guard rail and the sill of the coal bin was patent and obvious. The same space existed between the guard rail and the sill of each of the sixty and more coal bins upon which plaintiff had worked. "If a defect is so plain and obvious to the senses that in the exercise of ordinary care the employee would discover it, and he continues in the employment without complaint and without any assurance by the master that the defect will be repaired or the danger removed, he assumes the risk arising from it." *C. & E. I. R. Co. v. Heery*, 203 Ill. 492-497, and cases there cited.

Under the facts of this case and the rules of law relating to the assumption of risk, if the existence of the open space complained of could be regarded as a defect which made the scaffold or platform unsafe or dangerous, the plaintiff must be held to have assumed the risk arising from such defect.

The judgment of the Superior Court will be reversed with findings of fact.

Reversed.

City of Chicago v. Northwestern Mutual Life Insurance Company.**Gen. No. 11,695.**

1. **VOLUNTARY**—*when payment is not.* The payment of an unjust water rate under threat of shutting off the future supply, is not voluntary.

2. **ASSUMPSIT**—*when lies to recover money paid under protest.* Assumpsit lies to recover unjust water rates paid under protest where payment was exacted under threat of shutting off the future water supply of the premises against which the rate was charged.

3. **INTEREST**—*when may be recovered.* Interest may be recovered upon money wrongfully obtained by the defendant and illegally withheld from the plaintiff.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed May 5, 1905.

Statement by the Court. The City of Chicago has for many years owned and operated a system of water works, by means of which it supplies the inhabitants of the city with water, and said inhabitants have been and are wholly dependent upon the city for their supply of water. The City by ordinance established certain rules for the control of its water supply. Section 32 of the ordinances regulating "Vacancies," provides:

"Any person failing to pay his or her water rates or taxes assessed or charged within the time prescribed hereinbefore, shall not be entitled to any discount, and in case of the failure of any person to pay his or her water rates or taxes within sixty (60) days after the first day of the current assessment period, shall at once have the water supply cut off by the bureau of water from the premises against which rates or taxes are outstanding. In case of failure on the part of the bureau of water to shut off the said supply of water from any premises where there is a 'buffalo' or 'shutoff' box on or before thirty (30) days prior to the expiration of the current collection period, as aforesaid, the bureau of water shall lose any lien it may have against said premises for water used as to 75 per cent. of the frontage

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rates and all extra fixtures, and shall collect the same from the user of said water by action at law."

The Northwestern Mutual Life Insurance Company during the four years prior to 1901 obtained the title to twenty-eight lots in said city through foreclosure proceedings. Back water rates were due the City for water supplied to the former occupants of said lots prior to the time the insurance company acquired title thereto. The City demanded that the insurance company pay said back water rates and gave notice that on its failure to do so it would shut off the water from any lot on which such back water rate remained unpaid. The insurance company paid under protest such back water rates and in an action of assumpsit recovered against the City a judgment for the amount of back water rates so paid with interest, and from the judgment the City prosecutes this appeal.

WILLIAM D. BARGE, for appellant; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

HOYNE, O'CONNOR & HOYNE, for appellee.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

The case was submitted to the court upon an agreed statement of facts, and the questions presented by the record are questions of law only. The City asked the company to pay the back water rates and to induce such payment declared its intention to shut off a future supply of water from any lots upon which such back water rate was not paid. In order to prevent such shutting off of the water and to obtain a supply of water for its lots from the time it acquired title thereto, at the rates fixed by the ordinance of the City, the insurance company paid the back water rates demanded, and the question is whether it is entitled in this action to recover the money so paid.

The contention of appellant is that it cannot; that the payments were made voluntarily, with a full knowledge of all the circumstances; that the City had the right to say

that it would not furnish a future supply of water to any one of said lots unless its old bills for water supplied to occupants of such lot before the company acquired title thereto were paid; that as to the amount of back water rates on each lot paid by the insurance company, the company must be considered as having made with the City a contract to pay to the City the amount of such back water rates as well as the rate fixed by the ordinance for the water supplied after the company became the owner of the lot, as the consideration for 'the future supply of water to such lot, and that having made such contracts and paid the money under them, the company could not retract and recover the money paid under such contracts.

On the other hand it is contended that such payments can not be considered voluntary; that the parties were not on an equal footing; that the buildings on a lot without a supply of water would be unfit for occupancy; that the City would not, unless such payments were made, supply the water to the lots of the company which the company was by law entitled to receive from the City without making such payments, and that such payments must be held to have been made through coercion and under duress.

In *Wagner v. Rock Island*, 146 Ill. 139-154, it was said that the business of furnishing the inhabitants of a city water by means of such a system of water works as appellant owns and operates, "is a business which is public in its nature and belongs to that class of occupations or enterprises upon which a public interest is impressed. The business carried on by common carriers, telegraph companies and gas companies are examples of the same class." If a common carrier of freight refuse to accept goods for carriage without the payment of more money for the freight than he is entitled in law to charge, or if having carried goods he refuses to deliver them to the owner without the payment of more money than he has a right to demand for such carriage, the owner may in either case pay, under protest, the amount illegally demanded and recover the same in an action against the carrier for money had and received. *Beckwith v. Frisbie*, 32 Vt. 559, and cases there cited.

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It is not claimed that the City had any lien on the lots for the back water rates, or that the insurance company was under any obligation to pay the same, but the sole contention is that the payments were made voluntarily. The contention is necessarily based upon the hypothesis that the City has the right to fix the terms and conditions upon which it will supply water to any particular lot. "But it is a rule of the common law that parties carrying on a business which is public in its nature or which is impressed with a public interest, cannot select their patrons arbitrarily, but must serve all who apply on equal terms and at reasonable rates." *Wagner v. Rock Island, supra*, 156.

The city had no right to compel the insurance company to pay back water rates on a lot as a condition for the future supply of water to the lot, for it was its duty to supply such water at the rate fixed by the ordinance.

The precise question here involved was decided adversely to the contention of appellant in *Westlake et al. v. St. Louis*, 77 Mo. 47, and in *Brewing Ass'n v. St. Louis*, 140 Mo. 419.

We are of the opinion that the payments of back water rates made by the insurance company to the City were not voluntary. They were made under protest and to induce the City to do that which it was in law bound to do without such payments. The parties were not on equal terms. The City officials possessed the power, and threatened to exercise it, of cutting off the water from the company's property unless their illegal demands that the back water rates for such property be paid, were complied with. The property of the company was improved with buildings used as stores, flats and residences, with water pipes, tubs and boilers connected with the water system of the City, and all of said buildings were occupied by tenants of the insurance company. Such buildings must be supplied with water from the water system of the City to make them habitable and it was the right and duty of the company to see to it that the supply of water to its buildings was not cut off or interfered with.

Lane v. Brooks.

It follows from what has been said, that in our opinion the money of the plaintiff was wrongfully obtained by the defendant and illegally withheld by it from the plaintiff. In such case a municipal corporation is liable for interest on the money so obtained and withheld. County of La-Salle v. Simmons, 5 Gil. 516; County of Pike v. Hosford, 11 Ill. 176; Vider v. Chicago, 164 Ill. 358; City of Peoria v. Cons. Co., 169 Ill. 39; City of Danville v. Danville Water Co., 180 Ill. 246.

The judgment of the Superior Court will be affirmed.

Affirmed.

C. H. Lane v. Fred L. Brooks.

Gen. No. 11,701.

1. **FORCIBLE DETAINER**—*when action for, cannot be maintained.* An action for wrongful detainer of demised premises cannot be maintained after default in payment of rent where no notice of election to terminate the lease was given and the lease did not provide that the non-payment of the rent should put an end to the same or to the term thereby created.

2. **ELECTION**—*when institution of action not notice of.* The institution of an action of forcible detainer is not notice of an election to terminate the tenancy for non-payment of rent such as will enable such action to be maintained without other notice.

Action of forcible entry and detainer. Appeal from the County Court of Cook County; the Hon. DWIGHT C. HAVEN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed May 5, 1905.

Statement by the Court. Appellee was the tenant of appellant under a lease containing the following provisions:

“If default be made in the payment of the rent above reserved or any part thereof, or in any of the covenants of said lease by the lessee, it shall be lawful for the lessor, at any time thereafter, at his election, *without notice or demand of rent*, to declare said term ended and to re-enter said demised premises or any part thereof, either with or

without process of law, and the said party of the second part to expel, remove and put out, and the said premises again to repossess, as before said demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breaches of covenant."

The rent for June, 1903, which by the terms of the lease was due on the first day of that month, was not paid, and appellant on June 18, 1903, brought an action of forcible entry and detainer against appellee. The cause was submitted to the court, and there was a finding and judgment for the defendant, from which the plaintiff prosecutes this appeal.

WHEELER, SILBER & ISAACS, for appellant.

G. W. KRETZINGER and E. F. ABBOTT, for appellee.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

The plaintiff did not before bringing this action demand payment of the rent nor give the defendant notice of his election to declare the term ended or the lease terminated because of the default in the payment of rent. The stipulations contained in the lease gave to the landlord the right to declare the term ended without demanding the rent. But the question remains whether the landlord without notice to the tenant of his election to declare the term ended can, under the statute, maintain an action of forcible entry and detainer against the tenant.

Section 2, Chapter 57, R. S., provides that: "The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided. * * * Fourth, when any lessee of the lands or tenements, or any person holding under him, holds possession without right after the determination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit or otherwise." This question does not appear to have been passed upon by any court of review in this State. In *Espen v. Hinchliffe*, 131 Ill. 468, the lease contained a provision that, "the simple fact of the non-payment of the

rent reserved shall constitute a forcible detainer," and the court said, p. 472: "The propositions of law refused by the trial court are based upon the theory that the clause in the lease waiving notice, demand for payment of rent, or possession, and agreeing that the fact of the non-payment of the rent should constitute a forcible detainer, is of no binding effect in this form of action. * * * This position is untenable." In *Belinski v. Brand*, 76 Ill. App. 404, the lease contained a provision whereby the lessee "expressly waived all right to any notice or demand under any statute of this State relating to forcible entry and detainer."

The lease in this case contains no provision similar to that contained in the lease in *Espen v. Hinchliffe*, whereby the tenant agreed that the fact of non-payment of rent should constitute a forcible detainer, nor any provision similar to that contained in the lease in *Belinski v. Brand*, whereby the tenant expressly waived all right to any notice or demand under the statute of this State relating to forcible entry and detainer. The right of the plaintiff to bring and maintain this action, without previous notice to the defendant of his election to declare the term ended, is based wholly upon the provisions of the lease above set forth.

To constitute a valid contract the assent of both parties must be mutual, intended to bind both sides, and coexist at the same moment of time. *Benjamin on Sales*, Sec. 39.

"It is not sufficient, to constitute a binding contract between the parties, that one of them makes a proposal which is communicated to the other, and that other secretly resolves in his own mind that he will accept the offer made; nor is it even sufficient that he openly declares his acceptance, unless that fact be communicated by him to the party making the proposal. In other words, there must be notice of the acceptance from the acceptor to the proposer." *Wade on Notice*, Sec. 379.

A contract once made can be rescinded or put an end to only by the mutual assent of both parties. The same rules that apply to the making of a contract apply to the rescission or the putting an end to the contract.

Under the provisions of this lease the non-payment of rent did not put an end to the lease or to the term thereby created. The lease gave to the landlord a continuing option at his election to declare the term ended in such case. But he could not make this election and put an end to the term by any secret resolve of his own mind, any more than can one to whom an offer or proposal is made accept the same and make a contract by mere "mental assent" to such offer or proposal.

It was insisted in argument that the action was a sufficient election by the landlord to declare the term ended, as an action is a sufficient demand on a note payable on demand. But the distinction between the cases is plain. The law deems a note payable on demand to admit a present debt to be due to the payee, payable at all events, whenever and by whomsoever presented for payment, and no demand is necessary for any purpose, other than that which is made by the action. But to maintain this action the plaintiff was bound under the provisions of the Forcible Entry and Detainer Act to show that the defendant at the time the suit was brought held possession of the demised premises, "without right after the determination of the lease." To entitle the plaintiff to a judgment he must show that his right of action existed when his action was brought. If it be conceded that the bringing of the action was an election by the plaintiff to declare the term ended, that election was made *eo instanti* with the bringing of the action, and if the term was ended and the lease determined by the plaintiff's act of bringing this action to be restored to the possession of the demised premises, it is clear that when the action was brought the defendant was not holding possession of the demised premises, "without right after the determination of the lease," and the plaintiff was therefore not entitled to judgment.

The judgment of the County Court will be affirmed.

Affirmed.

Kreidler v. Hyde.

William A. Kreidler v. Nellie M. Hyde.

Gen. No. 11,724.

1. **DEFICIENCY DECREE**—*when averment insufficient to support.* An averment that the mortgaged premises were conveyed to the defendant, "who assumed and agreed to pay" the indebtedness secured by the trust deed, is but an averment of a conclusion and not sufficient to sustain a deficiency decree.

2. **DEFICIENCY DECREE**—*when evidence not sufficient to sustain.* A deficiency decree is not sustained by the introduction of a certified copy of a recorded deed to the defendant which contained the usual assumption clause; such proof should be supplemented by evidence that such deed was delivered and accepted by the grantee or that he in some way fully assented to such assumption clause.

Foreclosure proceeding. Appeal from the Circuit Court of Cook County; the Hon. EDWARD O. BROWN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Reversed and remanded. Opinion filed May 5, 1905.

Statement by the Court. Cynthia Jane Wessels and husband made and delivered to appellee their promissory note for \$1,100, payable three years after date, and conveyed a certain lot by a trust deed in the nature of a mortgage to secure the payment of the note.

In a bill to foreclose said trust deed, filed by appellee as complainant against appellant and others, defendants, the complainant set out the facts above stated. The only allegation made in the bill respecting the liability of appellant is the following: "Your oratrix further represents that the above described premises were subsequently conveyed to William A. Kreidler, of the City of Chicago, County of Cook and State of Illinois, who assumed and agreed to pay the above described indebtedness."

Appellant, in his answer, denied that the mortgaged premises were ever conveyed to him, or that he ever assumed or agreed to pay the indebtedness by said trust deed secured.

A decree of foreclosure and sale was entered, under which the mortgaged premises were sold for less than the amount

of the decree. A deficiency decree was then entered against appellant, to reverse which this appeal is prosecuted.

DEFREES, BRACE & RITTER, for appellant.

No appearance for appellee.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

It is clear that the decree appealed from must be reversed. The averment that the mortgaged premises were conveyed to appellant, "who assumed and agreed to pay" the indebtedness secured by the trust deed, is but an averment of a conclusion and not a sufficient averment of fact on which to base a deficiency decree against him. *Thompson v. Dearborn*, 107 Ill. 87; *Baer v. Knewitz*, 39 Ill. App. 470; *Boisot v. Chandler*, 82 Ill. App. 261.

The only evidence offered for the purpose of showing that appellant had assumed or agreed to pay the mortgage debt, was a certified copy of a recorded deed to him of the premises, which contained the usual assumption clause.

This evidence would not be sufficient to support a deficiency decree against the grantee, under a bill containing the necessary averments. To support such a decree the evidence must show that the deed was delivered to and accepted by the grantee, or that he, in some other manner, assented to the assumption clause in the deed. The production of a certified copy of a recorded deed to a grantee does not prove the delivery of the original deed to him, nor its acceptance by him. *Thompson v. Dearborn*, *supra*; *Bay v. Williams*, 112 Ill. 91-94.

The decree of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

William F. Jackson, et al., v. Sherman House Hotel Company.**Gen. No. 11,731.**

1. **APPEAL FROM JUSTICE—when error to dismiss.** It would be error to dismiss an appeal for want of prosecution where such appeal was taken in the Circuit Court unless summons had been served upon the non-appealing party, or an original and an alias summons has been returned “not found,” or the appearance of such non-appealing party had been entered in writing ten days before the term at which such order was entered.

2. **APPEAL FROM JUSTICE—when court has jurisdiction of.** Where the defendant before the justice takes the appeal and perfects it in the Circuit Court and the plaintiff before such justice voluntarily enters his appearance in the cause, the Circuit Court acquires jurisdiction both of the parties and of the subject-matter.

3. **APPEAL FROM JUSTICE—when Circuit Court has jurisdiction to enter rule to justify.** The Circuit Court has jurisdiction to enter a rule upon the sureties upon the appeal bond to justify as soon as it acquires jurisdiction of the parties and of the subject-matter, notwithstanding such rule may have been entered at a term at which no dismissal could be had for want of prosecution and no trial could be entered upon.

4. **APPEAL FROM JUSTICE—when properly dismissed.** Where a rule is properly entered requiring that the sureties upon the appeal bond justify within a time fixed, and in default thereof the appeal be dismissed, a dismissal is properly entered where no effort is made to so justify and no extension of time is asked for or obtained and no new bond is tendered.

5. **DISMISSAL—what does not set aside order of.** An order providing that a dismissal be vacated upon compliance with a condition named therein, does not operate to vacate such dismissal in the absence of a compliance with such condition.

Action commenced before justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed May 5, 1905.

• **Statement by the Court.** September 16, 1903, appellee recovered a judgment against appellants before a justice of the peace for \$200 and costs. September 25, 1903, the defendants filed their bond in the office of the clerk of the Circuit Court for an appeal from said judgment. No sum-

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mons was issued for the plaintiff, but November 25, 1903 the plaintiff entered its appearance in writing in the cause and on the same day a rule was entered in the cause, on motion of plaintiff's attorney, that the defendants justify on the appeal bond within three days, and that in default thereof their appeal be dismissed. December 1, 1903, an order was made reciting the failure of the defendants to justify as required by the rule theretofore entered and dismissing their appeal with twenty dollars damages for delay, etc.

December 3, 1903, the following order was made in the cause: "On motion of defendants' attorney it is ordered that upon the defendants paying ten dollars attorney's fees to plaintiff's attorney herein, that the order of dismissal and judgment heretofore rendered herein be vacated."

On the same day the defendants, without complying with the condition of said order, filed in the clerk's office a second appeal bond.

December 5, 1903, an order was entered in the cause by which the defendants' motion to modify the order of December 3d, by striking therefrom the condition of payment of attorney's fees was denied, and it was ordered that said second appeal bond be stricken from the files. The order also overruled the motion of defendants to vacate all orders theretofore made in the cause for want of jurisdiction, and from this order this appeal was taken. The record contains no bill of exceptions.

F. C. STRUCKMEYER and HENRY K. LOEB, for appellants.

JAMES EDWARD PURNELL, for appellee.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

The principal contention of appellants is that the order of dismissal is void because no summons had been served on defendants nor had its appearance been entered ten days before the commencement of the term at which the order of dismissal was made.

Where an appeal is taken from the judgment of a justice of the peace by filing a bond in the upper court, the appellee is not bound to follow the appeal, as he is when the bond is filed with the justice, but a summons must be issued and served on the appellee as in other cases, with the exception that if an original and alias summons are issued and both returned "not found," the Appellate Court may proceed to try the cause as if the appellee had been served with process. R. S., chap. 79, secs. 65 and 67. Sec. 68 provides that in such cases if the appeal bond and transcript are filed ten days before the commencement of the term and the appellee enters his appearance in writing ten days before the first day of the term, "the cause shall stand for trial at that term."

It is well settled that under the foregoing provisions of the statute unless a summons has been served, or an original and alias summons returned "not found," or the appearance of the appellee entered in writing ten days before a term, neither party has the right to a trial at such term, and it is error at such term to dismiss either the appeal or the suit for want of prosecution. But the appeal in this case was not dismissed for want of prosecution, but for the failure of the defendants and appellants to comply with a rule entered by the Circuit Court, and the question presented by the record is not as to the jurisdiction of that court to compel either party to go to trial at the November term, or at that term to dismiss the appeal for want of prosecution, but is, as to the jurisdiction of that court, at that term, to enter the rule that was entered and to dismiss the appeal for the failure of the defendants to comply with such rule.

By the filing of the transcript and appeal bond in the Circuit Court September 20, 1903, that court acquired jurisdiction both of the subject-matter and of the person of the defendants who took the appeal, and from that time the appeal was pending in that court. True, the Circuit Court did not thereby acquire jurisdiction of the person of the plaintiff, and but for its voluntary act, could have ac-

quired jurisdiction over it only by the issuing and service of summons in the manner provided by statute. But the plaintiff voluntarily, at the November term, entered its appearance in writing and moved for a rule on defendants. The plaintiff thereby submitted itself to the jurisdiction of the court and from that time the court had jurisdiction of the parties and of the subject-matter. True, the cause did not stand for trial at that term and could not at that term have been dismissed for want of prosecution. Neither would an original suit begun less than ten days before the term stand for trial at the first term, nor could it at that term be dismissed for want of prosecution. But if, in such a case, the defendant, at the first term, voluntarily entered his appearance in the cause, the jurisdiction of the court at that term to hear and dispose of a motion of the defendant to quash a *capias* or writ of attachment, to require a non-resident plaintiff to give security for costs, or to dispose of a demurrer to the declaration is undoubted, and if a demurrer to the declaration be sustained and the plaintiff elect to stand by his declaration the court could at the first term dismiss the suit for want of a sufficient declaration; or if a non-resident plaintiff failed to comply with a rule to give security for costs, the court could at the first term dismiss the suit for failure to comply with such rule. In our opinion the Circuit Court in this case had jurisdiction, at the November term, to enter the rule that was entered in this case.

It is next objected that before dismissing the appeal, defendants should have been ordered to file a new bond within a time to be fixed by the court. No doubt under the statute and decisions, the Circuit Court could not in its first order, order that an appeal be at once dismissed because of the insufficiency of the appeal bond, but must give the appellant time to file a new bond. But we do not think the objection is well taken to the proceedings in this case. The first order was not that the appeal be dismissed, but that the defendants justify on the appeal bond within three days, and that in default thereof the appeal be dis-

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missed. The defendants made no effort to comply with this rule, no motion that the time be extended, no application for leave to file a new bond within the time fixed by the rule, and three days after that time expired, their appeal was dismissed. Two days after the appeal was dismissed the following order was made: "On motion of defendants' attorney it is ordered that upon payment of ten dollars attorney's fees to plaintiff's attorney herein, that the order of dismissal and judgment heretofore rendered herein be vacated."

This order did not vacate the order of dismissal and judgment. It merely fixed and stated a condition, upon the performance of which by the defendants the order and judgment would be vacated. The cause was no longer pending, and while the court, at the term, could vacate the judgment and order of dismissal, until that was done the defendants had no right to file a new appeal bond. Yet the defendants on the day the order was made, without complying with the condition of the order, filed a new appeal bond, which was properly stricken from the files.

We find in the record no reversible error and the judgment of the Circuit Court will be affirmed.

Affirmed.

In the Matter of the Petition of William H. Mansfield.

Gen. No. 11,711.

1. **MALICE**—*as used in Insolvent Debtor's Act, defined.* Malice, as used in the Insolvent Debtor's Act, applies to that class of wrongs which are inflicted with an evil intent, design or purpose; it implies that the guilty party was actuated by improper or dishonest motives and requires the intentional perpetration of an injury or wrong upon another.

2. **MALICE**—*when, not gist of action.* Where the character of the action is determined by the verdict and such verdict is to the effect that the defendant was "guilty of wrongfully converting to his own use the goods of the plaintiff," the action is one of trover and malice does not appear as the gist thereof.

3. **GIST OF ACTION**—*defined.* The gist of an action is the essential ground or principal subject-matter without which the action could not be maintained.

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Petition for discharge under Insolvent Debtor's Act. Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed May 16, 1905.

Statement by the Court. William H. Mansfield filed in the County Court his petition under the Insolvent Debtor's Act to be released from arrest and imprisonment under an execution against his body, issued by a justice of the peace upon a judgment recovered before him by the Brower-Wanner Company against the petitioner. Upon the hearing the County Court ordered that the petitioner be discharged, and from that order the judgment creditor prosecutes this appeal. The transcript of the justice shows that August 24, 1903, appellant brought before him an action in trover against appellee; that the defendant was duly served with summons, but did not appear; that the plaintiff demanded a trial by jury, and a jury was impanelled, which returned the following verdict: "We, the jury, find the defendant guilty of wrongfully converting to his own use the goods of the plaintiff of the value of \$82.74;" that upon this verdict the justice entered a judgment "that the plaintiff have and recover of the said defendant the sum of \$82.74 and costs of suit, and judgment in trover ordered and entered thereon."

FREDERICK ULLMAN and NICHOLAS W. HACKER, for appellant.

JOHN C. TRAINOR, for appellee.

MR. PRESIDING JUSTICE BAKER delivered the opinion of the court.

Section 3 of the Justices and Constables Act provides, that a justice may issue an execution against the body of the defendant "upon all judgments in actions of tort." Section 2 of the Insolvent Debtor's Act provides for the release of a debtor arrested or imprisoned under such an execution when the same was issued upon a judgment "in any civil action when malice is not the gist of the action."

It may be difficult to see any good reason why one rule should apply to the issuing of an execution against the body of a defendant, and another to his petition in the County Court to be released from arrest; why such a writ may issue upon "all judgments in actions of tort," but defendant arrested upon such writ must be discharged from arrest where the writ was issued upon a judgment in any civil action "when malice was not the gist of the action;" but these are questions for the legislature to determine.

Malice as used in the Insolvent Debtor's Act, "applies to that class of wrongs which are inflicted with an evil intent, design or purpose. It implies that the guilty party was actuated by improper or dishonest motives and requires the intentional perpetration of an injury or wrong upon another. (First National Bank v. Burkett, 101 Ill. 391; Kitson v. Farwell, 132 Ib. 327.) * * * The gist of an action is the essential ground or principal subject-matter, without which the action could not be maintained. Gould's Pl., chap. 3, sec. 8; First Nat. Bank of Flora v. Burkett, *supra*." Jernberg v. Mix, 199 Ill. 254-256.

By the verdict in this case the defendant was found guilty of "wrongfully converting to his own use goods of the plaintiff" of a certain value. This was a verdict in trover, not a verdict in an action on the case for fraud, deceit or other intentional wrong or injury done or perpetrated by the defendant upon the plaintiff. The judgment was a judgment in trover—not because the justice called it a judgment in trover, but because the verdict was a verdict in trover, because the wrong, the tort, of which the defendant was found guilty, was the wrongful conversion by him of the goods of the plaintiff, and the judgment rests upon and must be held to conform to the verdict and to be the judgment that is in law proper upon the verdict.

Malice is not the gist of an action of trover. Jernberg v. Mix, *supra*; Mahler v. Sinsheimer, 20 Ill. App. 401.

A wrongful intent is not an essential element in a conversion. Pease v. Smith, 61 N. Y. 477.

When a judgment is rendered in an action begun in a

court of record, we look to the record only to determine whether malice was of the gist of the action, except in cases where there are several counts in the declaration, some alleging matters which make malice the gist of the action and others seeking recovery upon different ground. In such cases it has been held that resort may be had to extrinsic evidence to determine upon what count recovery was had. *Mahler v. Sinsheimer, supra*; *Smith v. Henry*, 46 App. 42; *Masterson v. Furman*, 89 Ill. App. 291.

In a suit before a justice of the peace there are no written pleadings. The action is such as the evidence makes it, and if the plaintiff proves any ground of recovery of which the justice has jurisdiction, he is entitled to a judgment. *Allen v. Nichols*, 68 Ill. 250.

It may be that in case of a general finding and judgment of guilty by a justice, or of a judgment upon a verdict of guilty by a jury in a justice court, which would be responsive and proper, as well in an action of tort of which malice was, as in one of which malice was not the gist, resort may be had to extrinsic evidence to determine whether malice was or was not the gist of the action in which such judgment was rendered. But the verdict in this case was not a general verdict of guilty, but a verdict that the defendant was "guilty of wrongfully converting to his own use the goods of the plaintiff." The character of the act which constituted the conversion depended upon the intent with which such act was done. If it was done fraudulently with intent to injure and defraud the plaintiff, then it in law was done maliciously. If it was not done fraudulently with intent to injure or defraud the plaintiff, then, although wrongful, it was not malicious, and the plaintiff could not recover damages therefor in an action of which malice was the gist. If the act of conversion was fraudulent, done with intent to injure and defraud the plaintiff, then the plaintiff might bring an action on the case therefor of which malice was the gist, or bring an action of trover of which malice was not the gist, or waive the tort and sue in assumpsit. The verdict of the jury in this case was, we think, a finding by it that malice was not the gist of the action as the verdict

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in *Blattau v. Evans*, 57 Ill. App. 311, whereby the jury found "the defendants guilty of wrongfully and unlawfully converting to their own use the property of the plaintiffs with the intent to injure and defraud the plaintiffs," was a finding that malice was of the gist of the action.

In our opinion the verdict and judgment shown by the transcript in evidence, show conclusively that the action in which the recovery was had was trover and therefore not an action of which malice was the gist, and the petitioner was therefore entitled, under the Insolvent Debtor's Act, to be released from imprisonment.

There is in the record, much evidence, some offered by appellee, some by appellant, as to the transactions between the parties out of which it is said the cause of action arose, but no evidence other than the justice's transcript of the evidence or proceedings before the justice.

The question before the County Court was not as to the character of the cause or causes of action which existed in favor of the plaintiff and against the defendant, but was as to the character of the action in which the judgment was rendered, to the end that it might be determined whether malice was or was not the gist of that action. If extrinsic evidence was admissible, it was evidence as to what occurred before the justice, of what evidence was there heard. If the judgment was rendered in an action of which malice was not the gist, the petitioner was entitled to be released from his imprisonment upon an execution issued upon that judgment, although there existed in favor of the plaintiff and against the defendant a cause of action, growing out of the same transaction, of which malice was the gist, upon which the plaintiff might have recovered judgment against the defendant.

In the view we take of this case the evidence as to the transactions between the parties out of which the cause of action arose, was not admissible, but as the petitioner was upon the transcript alone entitled to be released from imprisonment, such evidence was not harmful to appellant.

The order of the County Court will be affirmed.

Affirmed.

Helen E. Snow v. Morris Griesheimer.**Gen. No. 11,661.**

1. **REPLICATION**—*notice of special matter of reply cannot be substituted for.* The section of the Practice Act which provides for notice of special matters of defense has no application to special matters of reply to special pleas, and such a notice cannot be substituted for a formal replication.

2. **STATUTE OF FRAUDS**—*how availed of.* The Statute of Frauds, where sought to be availed of as a reply to special pleas, should be set up by replication.

3. **PAROL EVIDENCE**—*when, competent to vary terms of written instrument.* Where a written instrument has been fully performed, parol evidence is competent to vary its terms.

4. **ACCORD AND SATISFACTION**—*when arises.* Where a less sum than that actually claimed as due is tendered in full and is so accepted, an accord and satisfaction is effected.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed May 5, 1905.

Statement by the Court. This is an action in assumpsit for a balance of rent claimed to be due appellant under the terms of a written lease under seal. The defense is that by a verbal agreement between appellee and the agents of appellant, the rental fixed by the lease was reduced, and the entire rent at the reduced rate had been paid in full.

The demised premises consisted of a store occupied by appellee as his place of business. The lease was for a term of three years beginning May 1, 1895, and ending April 30, 1898, and the rental for the term was \$18,000. The full rent was paid according to the lease until May 1, 1896. After that time instead of paying \$500 per month as the lease required, appellee paid every month the sum of \$416.66 for the remainder of the term. There was a provision in the lease allowing appellee \$500 toward the cost of a new store front and in lieu of repairs and alterations.

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This allowance appellee seems to have received, although so far as appears he never put in the new store front.

Appellant's agents and attorneys to whom appellee paid the rent and with whom all his interviews and correspondence relating to the matter were had, positively deny appellee's claim that a verbal arrangement was made with him reducing the rent for the remainder of the term. It is conceded that in April, 1896, when appellee was urging that his business was unusually poor and he was having difficulty in paying his rent, appellant's agents did allow him a rebate for the summer months of 1896 only, agreeing to accept \$416.66 in full of the rent for those months alone. Appellant's testimony is positive that this reduction was limited to the summer months of that year. It is claimed by appellee that as consideration for the alleged reduction in rent for the remainder of the term, appellee agreed to repaper the store, paint the woodwork and put iron shutters on the rear, which he testifies was done.

At the trial appellee introduced in evidence certain of the checks with which he paid rental at the reduced rate for the period in dispute. Two of the checks so offered were alleged copies of the originals which it is claimed had been lost. The checks introduced were marked "in full" for the respective months for which the payments are claimed to have been made. It is positively testified by appellant's agent who received them as to at least nine of the checks so marked "in full" that they did not contain those words when they were received from appellee and deposited for collection. The evidence shows considerable correspondence between appellee and appellant's agents and attorneys, in which the latter appear to have uniformly denied that any arrangement had been made whereby the rent was to be reduced to \$416.66 monthly, and to have refused to accept appellee's payments of that amount except on account. Appellee's claim is that the alleged verbal reduction was made by appellant's agents with her consent and accepted by him, in the summer of 1896. His letters in evidence show, however, that in January and

March, 1897, and during the remainder of the term of the lease appellant's agents and attorneys were continuously demanding the full amount called for by the lease, for the whole term, excepting the summer months of 1896. Judgment was originally entered by confession under a power of attorney in the lease. Afterward the judgment was opened and appellee given leave to plead. The issues were submitted to a jury and a verdict returned in favor of appellee, upon which judgment in his favor was entered.

BURLEY & MCSURELY, for appellant; ARTHUR W. BURNHAM and EDWARD R. HILLS, of counsel.

NEWMAN, NORTHRUP, LEVINSON & BECKER, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Appellee pleaded the general issue to the plaintiff's declaration in assumpsit and also filed two special pleas setting up the alleged verbal agreement reducing the rent for the last two years of the term. These pleas were not demurred to, and it is claimed that their legal sufficiency was therefore admitted. The replication filed by appellant is, as appellee's attorneys suggest, *de injuria* and tenders an issue of fact on the special pleas. It sets forth that plaintiff "of his own wrong and without the cause or causes in his said last mentioned first and second special pleas alleged and in each and either of them, committed the said trespass in manner and form" complained of, and prays that this "may be inquired of by the country." In form the replication would be appropriate in an action of trespass. Subsequently plaintiff's attorneys filed a notice that on the trial the plaintiff would introduce evidence that no note or memorandum in writing was ever made of the alleged agreement set forth in defendant's special pleas, although not to be performed within a year, and that it was therefore obnoxious to the Statute of Frauds. There is no warrant for any such notice, and it must be deemed void. The statute provides for notice by the defendant under the general issue in lieu of pleading special matters of fact (R. S., chap. 110, sec. 29), but we know of no authority for its

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use as here employed. As a general rule the Statute of Frauds must be pleaded if relied on, the reason being that a contract within the statute is not absolutely void but voidable at the election of the party against whom it is sought to be enforced. It is true that it may be relied upon under the general issue upon the evidence without pleading it where the declaration contains only the common counts (*Beard v. Converse*, 84 Ill. 512-516), but in the case before us that defense could not arise under the plaintiff's declaration. It might perhaps have been available in answer to the special pleas which set up a verbal contract claimed to be obnoxious to the statute. The defense is not made, however, in any available form under the pleadings and must be deemed not an issue in the case.

The more serious question is whether it was error to allow the defendant to introduce evidence of a parol agreement, which it is claimed changed, altered and modified a written lease under seal. The rule is not seriously questioned that such a contract under seal cannot be so modified. *Alschuler v. Schiff*, 164 Ill. 298. In this case there is no claim that the lease was entirely set aside. The claim is that by parol agreement it was changed in one of its most material provisions fixing the amount of the rent to be paid by appellee. It is, however, urged in behalf of the latter that the contract was executed and not executory, that the lease as modified by the alleged verbal agreement had been fully performed when the suit was brought and is no longer a living contract. This raises questions which were, we think, properly submitted to the jury; first, whether such verbal agreement was in fact made and if so, second, whether the provisions of such agreement and the terms of the written lease as modified by it were in fact fully carried out and performed. Had appellant sued from month to month or at any time before the expiration of the lease or before accepting payment under it as modified by the alleged verbal agreement, the evidence of a verbal alteration would not have been admissible. The jury had before it the evidence relating to the alleged parol agreement and the alleged consideration for it and the payments alleged to

be made under it. The evidence was conflicting, and we must regard their finding as conclusive in those respects. There is evidence tending to show appellant's agents were denying the alleged verbal agreement, and that they received the payments made by appellee with frequent statements that they were only accepted on account. Yet the fact remains that if the jury believed the alleged oral agreement to have been made as contended by appellee and that the amounts due under it were fully paid and accepted by the lessor without other action until the whole contract as alleged to have been modified was fully executed, we do not feel at liberty to say that their finding is not warranted by evidence, even though as jurors we might have reached a different conclusion. We are not to be understood as intimating that the acceptance of a less sum than the amount due under the lease would have the effect to discharge the balance. But if appellee actually sent checks for the reduced amount with the specific statement from month to month that such amount was sent in full payment for the rent of such months, as the jury seem to have found, the acceptance of the checks under such conditions implied a compliance with the terms upon which they were sent. Appellant could not otherwise retain them without the concurrence of the payor. *Ostrander v. Scott*, 161 Ill. 339-345.

What we have said substantially disposes of material questions presented in the briefs. For the reasons indicated the judgment must be affirmed.

Affirmed.

William L. Breyfogle v. Henrietta C. Addison.

Gen. No. 11,692.

1. ACCEPTANCE—*when consideration of, cannot be questioned.* The acceptor of a draft cannot question the consideration of his acceptance where the same has been received by a third party for value given.

Action in assumpsit. Appeal from the Superior Court of Cook County; the Hon. H. B. WILLIS, Judge, presiding. Heard in the

Breyfogle v. Addison.

Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed May 5, 1905.

ELMER H. ADAMS, for appellant.

A. M. LASLEY, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court
This is a suit upon a draft drawn upon and accepted by appellant.

Material facts as disclosed by the evidence are that appellant was interested with one John Addison, husband of appellee, in the purchase of a gold mine. Apparently it became necessary to raise additional money to complete the purchase, and several telegrams passed between Addison and appellant. In one of these, dated January 28, 1895, Addison wired appellant, "I borrowed until the 30th. You must meet it." Upon the 29th appellant replied by letter acknowledging receipt of the telegram and saying, "If you could arrange that by a draft for thirty or sixty days so as to pass the 14th, I think it would be advisable to do so. A draft could be drawn and I would accept it here. I would rather it should be made for ninety days, however, as that relieves the other matters and puts it beyond any possible doubt." The next day appellant sent a telegram to Addison saying, "Best I can do is to accept your sixty days draft on me \$2,000. This will be paid at maturity." February 1st following, Addison wrote appellant that he had obtained the money and sent it to one Jackson (who was apparently acting for them in completing the purchase of the mine), and that he had "got Estey & Camp to accept your draft for same, which please accept and return to them." February 4th appellant wrote Addison that he would accept the draft and have it returned. He did so and that draft is the bill of exchange upon which the present suit is brought. It clearly appears, therefore, that it was drawn and accepted to replace money borrowed by Addison for the use of himself and appellant in closing up the purchase of the mine.

The draft was drawn by Estey & Camp February 1, 1895, at sixty days sight. Meanwhile appellee, who is the wife of John Addison, had sold notes of her own and with the proceeds she paid to Estey & Camp the amount her husband had borrowed of them which had been applied on the purchase of the mine. The accepted draft in controversy was turned over to her to reimburse her for the amount she so paid. Two payments are endorsed upon the draft, one of \$500 and one of \$150. Appellant claims that these were not paid nor intended to be paid upon the draft, but were loans made by him to appellee's husband. There is evidence, however, tending to show that for the \$500 payment appellant took a written receipt which expressly states the payment to have been made to apply on the draft in question.

It is contended the acceptance was purely accommodation paper wholly without consideration. The evidence does not sustain this contention. It is immaterial where the draft was kept or by whom, pending the effort to collect it. It was given to pay an obligation incurred in the purchase of the mine by appellant and his associate Addison, and the title to it passed to appellee when she paid the money and received the acceptance, either in person or by an agent. The evidence tends to show that appellant received full consideration for the acceptance, and also that appellee paid the full consideration for it herself. Whether so or not, however, the acceptor cannot be heard now to insist that its acceptance was without consideration, whether he was indebted or thereafter became indebted to the drawer or not. *Nowak v. Excelsior Stone Co.*, 78 Ill. 307-308. The accommodation acceptor cannot set up such defense. *Diversey v. Loeb*, 22 Ill. 394. The acceptor is primarily liable to pay the draft and incurs the same liability as the maker of a promissory note. *Cronise v. Kellogg*, 20 Ill. 11-14; *Diversey v. Moor*, 22 Ill. 331-333. Under the evidence in this case it is immaterial whether the endorsement to appellee was made before or after the maturity of the draft. Appellant would have had no sound

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defense against it in the hands of the original payee and endorser and has none against it in the hands of appellee. This is not a suit by the drawer against the acceptor as in *Hardy v. Ross*, 4 Ill. App. 501, cited by appellant.

Finding no material error in the record the judgment must be affirmed.

Affirmed.

D. V. Purington, et al., v. George Hinchliff.

Gen. No. 11,284.

1. CONSPIRACY—*when agreements are unlawful and constitute a.* A series of agreements is unlawful and constitutes a conspiracy whereby substantially all of the building contractors of a particular locality agree to buy brick exclusively from certain specified manufacturers and by which the latter agree to sell brick to such contractors and to no one else and by which all the bricklayers in such locality agree to handle and lay only brick of such manufacturers obtained through such contractors.

2. CONSPIRACY—*when party chargeable with actionable results of.* The unlawful act which results in actionable wrong, need not be directly performed by the defendant. It is enough if it was done by or through the other defendants who were parties to the combination, or by agents, in pursuance of the objects which the combination was endeavoring to and did attain, namely, a total or general restraint of trade.

3. VERDICT—*when excessive.* A verdict for \$22,000 held excessive in an action for injury to the plaintiff's property and business through an unlawful conspiracy in restraint of trade.

Action on the case. Appeal from the Circuit Court of Cook County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1903. Affirmed upon *remittitur*. Opinion filed May 5, 1905. *Remittitur* filed and judgment affirmed May 9, 1905.

Statement by the Court. This is an action on the case brought by appellee against appellants, who are members of a voluntary association known as the Brick Manufacturers Association of Chicago, and against others who have not joined in this appeal.

The declaration alleges, among other things, that appellee

was a manufacturer and dealer in brick, owning a certain brick manufacturing plant at Hobart, Indiana, which had been acquired and equipped at a cost of \$50,000; that for six years prior to the time when the cause of action arose, he was engaged in the manufacture of brick which he sold almost exclusively in Cook County, receiving large profits from such sales; that during that time the Chicago Masons & Builders Association, one of the defendants, was a corporation in Cook County, comprising among its members about two-thirds of all persons and firms then engaged in the business of constructing brick and mason work in said county, and in the purchase of brick used in said county, including among its members substantially all the responsible and reliable persons or firms engaged in such business in said county; that during that time the members of said association constructed ninety-five per cent. of the brick and mason work done in said county, and plaintiff made sales of substantially all of the bricks of his manufacture and all that could be manufactured at his said plant to members of said association, from which he derived a profit of \$10,000 per year; that during this period there was in said county a voluntary organization of individuals known as the Brick Manufacturers Association of Chicago, comprising ninety-five per cent. of the manufacturers of brick in said county, who were dealers in and sellers of brick in said county, and that appellants were members of said association engaged in the business of manufacturing and selling brick; and that there was also in said Cook County a voluntary association known as the Bricklayers Union, comprising among its members ninety-eight per cent. of the competent brick layers of said county.

It is further averred that while the plaintiff was lawfully conducting his said business as a manufacturer and dealer in brick, the defendants (appellants herein), who are members of the Brick Manufacturers Association, wrongfully and unlawfully conspired and agreed among themselves and caused to be agreed by the Masons & Builders Association and its members, that the latter would not purchase,

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nor be permitted to purchase, any brick to be used by them or any of them, from any person, firm or corporation, except from members of the Brick Manufacturers Association, who had subscribed to the rules and regulations of said Masons & Builders Association; that said last named association also agreed with the Bricklayers Union, comprising ninety-eight per cent. of the competent bricklayers of Chicago, that the members of the said union would not handle nor lay brick except for members of the Masons & Builders Association; that after the making of said agreements, alleged to be illegal and corrupt and made with the purpose of injuring the plaintiff, the defendants actively interfered with the business of the plaintiff, preventing him from selling his brick, procuring persons to go to his customers and represent to them and workmen employed to lay and work with brick manufactured by the plaintiff, that if they should respectively purchase or use said brick, they would be prevented from completing or proceeding with such work; that by wrongful and malicious threats and by imposing fines upon persons dealing in or using the plaintiff's brick, the defendants have prevented their being laid and used, and the plaintiff has thereby been wholly deprived of the sales of brick in said county, which he otherwise would have had, has been unable to dispose of and sell his brick in Cook County and has been deprived of large gains and profits.

It appears from the evidence that the negotiations between the Masons & Builders Association which led to the agreements complained of, began in December, 1897, with the appointment of a committee by the Brick Manufacturers Association which obtained the appointment of a committee of the Masons & Builders Association, and the two committees in conference formulated the agreement. This seems to have finally gone into effect prior to October 1, 1898. The resolution of the Masons & Builders Association adopted at the time of the appointment of its committee of conference, provided *inter alia*, that "Whereas the brick manufacturers now have an organization which

takes in all of the brick manufacturers of Cook County and vicinity, and believing that it is established upon a sound and practical basis, and believing the system will control the price of brick in the future" and that an agreement would "greatly benefit and advance the interests of the Chicago Masons & Builders Association and will strengthen the Brick Manufacturers Association as well," therefore the committee be appointed, which was accordingly done.

Substantial provisions of the agreement thus made are, that the members of the Masons & Builders Association who sign the agreement, agree to buy sewer, hollow and common brick only from such members of the Brick Manufacturers Association as have signed the agreement and are in good standing in said association; and the members of the Brick Manufacturers Association who sign the agreement agree to give to the members of the Masons & Builders Association signing the agreement and in good standing, a trade discount from the trade price of one dollar a thousand brick. On all brick sold to purchasers outside of the Masons & Builders Association the Brick Manufacturers agree to pay into their treasury one dollar a thousand, the fund thus created to be divided every six months equally, one-half to their own members who have signed and are faithful to the agreement, and the other half to the faithful members of the Masons & Builders Association. There are provisions for enforcing the terms of the agreement by imposition of fines and penalties, and it was to take effect on and after April 1, 1898, within the limits of Cook County and north of the Joliet Branch of the Michigan Central Railroad in Lake County, Indiana.

There is evidence tending to show that plaintiff was the principal competitor in Cook County of the members of the Brick Manufacturers Association, that his plant had a capacity of from 50,000 to 60,000 bricks a day or about 15,000,000 bricks per year, that it was well equipped with machinery and "the clay was all right." It appears that plaintiff was at one time a member of the Masons & Builders Association and that he made efforts to secure admis-

sion to the Brick Manufacturers Association without success. These associations and associates, the Brick Manufacturers, the Masons & Builders and the Bricklayers Union, employed business agents and secret service men, whose business it was to see that the rules formulated to make effective the agreement between them were observed by their membership. There is evidence tending to show that after the agreement in question was in active force and operation, the plaintiff's business began to be interfered with by these agents and secret service men; that contractors and owners who were purchasing and using plaintiff's brick were compelled to cease using them, that large orders and sales were canceled, that one owner was compelled to pay a fine to the Masons & Builders Association before being permitted to complete with plaintiff's brick a building which was under way, that workmen were directed not to lay plaintiff's brick because he was not in the combination, and there is evidence of particular cases in which such interference occurred. In one case where, as the evidence tends to show, money had to be paid to the Masons & Builders Association for the privilege of using plaintiff's brick to complete a job then under way, in order to get the work completed, the association afterward returned the money when threatened with legal procedure. Plaintiff testifies that the result of the combination and consequent interference with his business was that his brick became "absolutely worthless. There wasn't hardly a man in Chicago that would handle them. The workmen all belonged to the union practically, and the hod carriers would not handle them or the bricklayers wouldn't lay them." He testifies that he was called on by the secretary of the Masons & Builders Association, who told plaintiff "that the joint committee of the master masons and the brick manufacturers crowd had just had a joint session in the next room adjoining my office and had directed him to inform me that they requested me to sell no more brick in the city of Chicago or Evanston. I told him they must be wrong; that it was equivalent to asking me to quit business. He said,

'there is no mistake on my part; the committee have just adjourned, and the members are still in the next room.' I said 'Go right back and tell them they are a bigger lot of fools than I thought they were, and I make a similar request of them.'"

Appellee's claim for damages was for loss of profits in his business and for depreciation in value of the land and buildings constituting his plant at Hobart, Indiana, used in the manufacture of brick. The court instructed the jury to the effect that there was no evidence tending to show this plant was damaged or injured by the acts complained of, and that the jury must not consider any such element of damage in arriving at their verdict. It was and is claimed, however, that plaintiff did suffer damages which the court's instruction precluded the jury from considering, resulting from the loss of his plant sold under foreclosure proceedings and depreciated in value owing to inability to dispose of its product in consequence of the conspiracy and combination complained of.

The evidence was submitted to a jury. A verdict was returned finding defendants guilty and assessing the plaintiff's damages at \$22,000. A motion for a new trial was overruled and judgment entered upon the verdict. Errors are assigned on the part of defendants, who were members of the Brick Manufacturers Association. The other defendants do not join in the appeal.

GEORGE W. PLUMMER and WHARTON PLUMMER, for appellants.

EDWIN F. ABBOTT, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Appellants seek to reverse the judgment on the broad ground that it is unwarranted in law and by the evidence. It is first contended that the agreements in question between the Masons & Builders Association and the Bricklayers Union, and that between the Brick Manufacturers Association and the Masons & Builders Association, were

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jointly as well as singly lawful and such as the parties had a right to make. The argument is, that appellants by entering into separate agreements claimed to be lawful in themselves, could not be and were not guilty of a conspiracy to accomplish an unlawful purpose, as charged in the declaration; that the agreement between the masons and builders and the bricklayers was an essential element in the combination; that this agreement was itself perfectly lawful and cannot, therefore, be regarded as entering into an unlawful combination and conspiracy. This agreement provided that the members of the Bricklayers Union should be allowed to work for members of the Chicago Masons & Builders Association, and, with a few specified exceptions, for no others; and members of the Chicago Masons & Builders Association should be allowed to employ members of the Bricklayers Union and no others. It is unnecessary, however, to consider the character of that particular agreement standing alone. A single act or agreement may be lawful and even unobjectionable in itself and yet form a part of a series of acts and agreements which are unlawful, designed and made with an intention to interfere with public, personal and property rights in unlawful ways. The material question relates to the character and operation of the combined agreements, that between the Brick Manufacturers and Masons & Builders Association in connection with that between the latter and the Bricklayers Union.

It is contended in behalf of appellee that the motive which led to the making of these agreements and the purpose for which they were made, is correctly stated in the preamble to a resolution adopted by the Masons & Builders Association pursuant to which the combination was formed. That preamble recites that, whereas the brick manufacturers "now have an organization which takes in all of the brick manufacturers of Cook County and vicinity," which is believed to be "established upon a sound and practical basis," and in the belief that "the system will control the price of brick in the future," and that an agreement will benefit

the masons and builders and strengthen the Brick Manufacturers Association as well, it is therefore resolved, etc. Under that resolution a committee was appointed and steps were taken to perfect such an agreement. Appellee charges that the agreements were made and the "system" established in order to drive him out of business in Cook County, substantially his only market; and in his declaration he sets forth alleged facts upon which he relies as tending to show that the agreements were made and the machinery which they created was used for that purpose and actually produced that result. There is evidence tending to sustain these averments. The arrangement was well calculated to and did "control the price of brick." Doubtless the operation of the agreements affected the public, and other competitors, if such there were, as well as appellee. There is evidence which tends to show that appellee was perhaps the principal active competitor of appellants in the manufacture of brick and its sale in Cook County. The tendency of the agreement, however, was without doubt to prevent the sale of brick in Cook County by any one in competition with appellants. When substantially all the building contractors in Cook County agree to buy brick exclusively from certain specified manufacturers and the latter agree to sell brick to such contractors and to no one else, and when substantially all the bricklayers in the county agree to handle and lay only the brick of said manufacturers obtained through said contractors and to work for the latter and no one else, there cannot be much question as to the purpose of such agreements nor as to the result. The evidence, practically undisputed, tends to show that as soon as the combination was fully effected and the agreements were in operation, the price of brick immediately arose in the Chicago market. The purpose of the combination may be properly judged from the inevitable results which speedily followed and must have been anticipated. The combination gave appellants arbitrary control of the price of brick, secured to them a monopoly of the Chicago market, enabled them to drive

out competition and practically destroy the business of persons not members nor permitted to become members of the Brick Manufacturers Association.

Appellants, nevertheless, contend that the agreements, which were as the trial court found designed to accomplish and did accomplish these results, were not unlawful nor actionable. In support of this contention it is argued "it is the fundamental right of every man to conduct his own business in his own way subject only to the condition that he does not interfere with the legal rights of others," and that "what one man may lawfully do singly, many after consideration may agree to do jointly." It is doubtless true, as said in *Carew v. Rutherford*, 106 Mass. 1-14, cited by appellants, that "it is no crime for any number of persons without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain classes of men or work under a certain price or without certain conditions." Yet it may become a criminal act to do things of that character in combination and in pursuance of an unlawful purpose. R. S., chap. 38, sec. 269a, *et seq.* In *People v. Sheldon*, 139 N. Y. 251-264, in passing upon the legality of an organization of coal dealers intended to prevent competition, the court said: "The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are in contemplation of law injurious to trade because they are liable to be injuriously used. * * * We are of opinion that the principle upon which the case was submitted to the jury is sanctioned by the decisions in this State, and that the jury were properly instructed that if the purpose of the agreement was to prevent competition in the price of coal between retail dealers, it was illegal and justified the conviction of the defendants." In *C. W. & V. Coal Co. v. The People*, 214 Ill. 421-448, it is said, that to enter into a combination to regulate and fix the price at which coal should be sold in Northern Illinois is unlawful "at common law and under the statutes of this State, there can be no doubt." Citing, *Craft v. McConoughy*, 79 Ill. 346;

More v. Bennett, 140 Ill. 69; Foss v. Cummings, 149 Ill. 353; Harding v. American Glucose Co., 182 Ill. 551. In Smith v. The People, 25 Ill. 9-14, it is said, "that conspiracies to accomplish purposes which are not by law punishable as crimes, but which are violative of the rights of individuals and for which the civil law will afford a remedy to the injured party and will at the same time and by the same process punish the offender for the wrong and outrage done to society by giving exemplary damages beyond the damages actually proved, have in numerous instances been sustained as common law offenses." In Jackson v. Stanfield, 23 L. R. A. 588-595 (Indiana), it is said that "a conspiracy formed and intended, directly or indirectly, to prevent the carrying on of any lawful business or to injure the business of any one by wrongfully preventing those who would be customers from buying from the representatives of such business by threats or intimidation, is in restraint of trade and unlawful." In Bailey v. Master Plumbers, 103 Tenn. 99, it was said that the natural and intended result of agreements of the character of those in controversy "is an illegal restraint on trade, a combination and trust in limited form tending to stifle competition and to create a monopoly in a particular line and commodity." Appellants had a right doubtless to refuse to sell their brick to any or every one, a right to sell to some and refuse to sell to others, to fix a price and refuse to sell at other prices. But it is another thing to engage in a combination in restraint of trade and with the purpose of driving competitors out of business. The method adopted by appellants to drive out competition was not a mere refusal to bestow patronage on those who should sell goods to a competitor not members of a certain association, as in Macauley Bros. v. Tierney, 19 R. I. 255; nor to prevent the sale of material by wholesale dealers directly to consumers instead of to retail dealers, as in Bohn Mfg. Co. v. Hollis, 54 Minn. 223, and American Live Stock Com. Co. v. Live Stock Ex., 143 Ill. 210; nor to force out of business or refuse to do business with one who does not pay his bills, as

in *Ullery v. Chicago Live Stock Exchange*, 54 Ill. App. 233, and *Brewster v. Miller's Sons Co.*, 101 Ky. 368, which are cases cited by appellants' attorneys. The distinctions are clear. While the agreements in controversy did not in set terms attempt to fix the prices of brick or control the market, they did put it in the power of appellants to do both of these things. They did not, it is true, in terms absolutely bind the brick manufacturers to sell only to the members of the Masons & Builders Association, yet such was their practical effect. They fixed a trade discount of one dollar a thousand from the contract price to be given to such members exclusively, and fined the brick makers the same amount in case any one of them should sell to outsiders. The effect was to give the members of the Masons & Builders Association a practical monopoly, in exchange for the agreement on their part to buy brick only of members of the Manufacturers Association at such prices as the latter might establish. It was monopoly for monopoly.

The form is not material in cases of this kind. It is the unlawful purpose of the combination, the methods it pursues and the results of its operation that determine its character in the eye of the law. There is evidence apparently undisputed in the case at bar of unlawful interference with appellee's business. This was consistent with and tended to show the unlawful purpose as evidenced by the acts of the parties for which the declaration avers the combination was organized. Nor do we deem it important if, as appellants' counsel contend, the evidence fails to disclose any directly active connection by any of appellants themselves with such unlawful acts. It is enough if they were done by or through other defendants who were parties to the combination, or by agents in pursuance of the objects which the combination was endeavoring to and did attain, namely, a total or general restraint of trade. *Doremus v. Hennessy*, 176 Ill. 608-614. See, also, *Harding v. Glucose Co.*, 182 Ill. 551-639. Lawful competition in trade may have the effect of driving men out of business and

creating a practical monopoly in those who survive the struggle. Such competition is legitimate, however, and not actionable, although its effect in particular cases may be similar to that brought about by unlawful means employed to destroy competition. That this may happen is no excuse or justification for the use of unlawful methods, by combination or otherwise, with intent to do a wrongful injury by inducing, as in the case before us, former customers not to deal with appellee nor to buy or use brick of his manufacture. In *Doremus v. Hennessey*, *supra*, it is said: "Every man has a right under the law as between himself and others to full freedom in disposing of his own labor or capital according to his own will, and any one who invades that right without lawful cause or justification commits a legal wrong, and if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong." The agreements in controversy were clearly unlawful and actionable.

There is evidence tending to show that appellee suffered loss and injury from the creation and operation of the combination effected by the agreements under consideration. He was, according to the evidence, the owner of a brick-making plant with a capacity of about 15,000,000 bricks a year, which was by the defendants' action eliminated from the market. It is said by appellants' attorneys that appellee was not, strictly speaking, a brick manufacturer himself. This may be true in one sense in that he appears to have operated his plant through others in part at least, but the fact remains that he dealt in and handled brick; and any combination which destroyed the market for brick manufactured at his plant directly affected his property rights.

It is claimed by appellants that any loss of profits suffered by appellee after the combination became operative, was caused by inherent defects in appellee's brick and not by the action complained of. We do not think the evidence sustains such contention, and so far as it is conflicting the jury have determined such conflict in favor of appellee.

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It is urged that the damages are excessive. It is not disputed that after the agreements in controversy became operative in the years 1898 and 1899, the selling price of brick was nearly double what it was the year before. Without reference to the causes of this rise in prices, the fact is apparent that any combination by which appellee was driven out of the market at that time was damaging. There is evidence which tends to show that he suffered damages larger than the amount awarded, but it is not conclusive and not entirely convincing. Whether any part of the verdict, and if so, how much was for punitive damages, we have no means of knowing. We are of opinion, however, that the judgment is for a larger sum than the circumstances justify and that it may with propriety be reduced.

Careful consideration discloses no other material error in the record. If, therefore, appellee shall within ten days remit \$7,000 from the amount of the judgment, it will be affirmed for the remainder. Otherwise the judgment will be reversed and the cause remanded.

Affirmed upon remittitur.

Remittitur filed and judgment affirmed May 9, 1905.

Manchester Fire Assurance Company v. John E. Fitzpatrick.

Gen. No. 11,698.

1. ACCOUNT STATED—*when recovery for, may be had.* A recovery for an account stated may be had where it appears that an insurance company has recognized and agreed to pay the loss sustained by its insured.

2. COMMON COUNTS—*when recovery may be had under.* Recovery may be had under the common counts where nothing remains to be done but to pay over the money due under the contract.

3. INTEREST—*when may be recovered.* Interest may be recovered upon an account stated.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in the Branch

VOL. 120.] Manchester Fire Assurance Co. v. Fitzpatrick.

Appellate Court at the March term, 1904. Affirmed. Opinion filed May 16, 1905.

STEERE & MOORE, for appellant.

JAMES C. McSHANE, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This action was brought to recover for loss occasioned by fire upon premises of appellee which were insured by appellant. After the fire the loss was considered by insurance adjusters representing other companies which had policies outstanding upon the same premises. Bids for repairing the damages were secured from contractors, and by agreement of the adjusters present with appellee, the contract was awarded to the lowest bidder. The amount of the bid was apportioned among the different insurance companies, and under that apportionment the *pro rata* share payable by appellant was found to be \$222 and some cents. Appellant was not represented at the meeting when this adjustment was made. Appellee and the contractor therefore went to appellant's office to ascertain if the arrangement was satisfactory to appellant. They met the manager of the Western Department of appellant for the United States and showed him appellant's policy, which the manager took and examined. He inquired of the contractor what appellant's *pro rata* share was, and upon receiving the information, said, "Go ahead and put the buildings in shape and we will stand our share." The work was accordingly begun. A few days thereafter appellant informed the contractor that it was not liable under the policy and told him to stop work. It appeared later that the ground for denial of liability was that the agent who had secured the insurance had not turned over to appellant the premium paid by appellee. The work was, however, finished according to the contract, and appellee subsequently brought this suit. No evidence was introduced in behalf of appellant, and the court directed a verdict for the amount of the latter's *pro rata* share as fixed by the adjusters with interest.

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It is urged that appellee was not entitled to recover under the common counts, but it is conceded that the common counts are sufficient, where the evidence shows a policy of insurance issued by the defendant to the plaintiff, a loss by fire in the buildings covered by the policy, and that the loss was adjusted and the defendant company promised pursuant thereto to pay a fixed sum to the plaintiff. *Miller's National Insurance Co. v. Kinnard*, 136 Ill. 199-201, and cases cited. Appellant contends, however, that the contract in this case was between the adjusters and the contractor and not with the plaintiff. The evidence as abstracted does not so indicate. So far as appears the arrangement was that each adjuster for his own company and appellant for itself by its manager, agreed to pay the plaintiff the *pro rata* share of the entire amount due the plaintiff under the policies respectively, necessary to make good his loss. The evidence is sufficiently clear and is uncontradicted that appellant agreed to pay the specific sum as stated, to make good the loss incurred under its policy upon the premises insured.

The claim of appellee is upon account stated, and recovery may be had as in other cases of admission without obliging the plaintiff to prove other and antecedent matters. No reason appears why the agreement on the part of appellant to pay the amount fixed by the adjustment should not be deemed final and binding in the absence of fraud, misunderstanding or mistake. Nothing remained to be done by appellant except to pay over the amount as agreed, and where nothing remains to be done but to pay over the money, the common counts suffice. *I. M. Fire Ins. Co. v. Archdeacon*, 82 Ill. 236-239.

Appellee was entitled to recover interest on the amount fixed upon settlement of account and ascertaining the balance. *R. S.*, chap. 74, sec. 2. The policy was properly admitted in evidence under the proofs.

Finding no error the judgment will be affirmed.

Affirmed.

E. Schneider & Co. v. Nellie Carlin, Administratrix.**Gen. No. 11,705.**

1. **FELLOW-SERVANTS—*who not.*** A skilled workman employed in a separate room from a common laborer is not the fellow-servant of such common laborer where they were not at the time of the accident in a position to exercise an influence over each other promotive of caution for their common safety.

2. **SERVANT—*right to presume that master will perform his duty.*** A servant is entitled to presume that the master will perform his duty and instruct inexperienced servants in the performance of their duties so that their uninstructed ignorant acts may not bring upon him an unexpected peril.

3. **MEASURE OF DAMAGES—*when inaccurate instruction upon, will not reverse.*** In an action on the case for death caused by the wrongful act of the defendant, an instruction which permits the jury to assess the plaintiff's damages at such sum as "in their opinion" the jury may find the widow, minor children and next of kin are entitled to, while inaccurate, will not reverse where such instruction contains a qualification that such opinion must be formed "under the evidence" in the cause.

Action on the case for death caused by alleged wrongful act. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Affirmed. Opinion filed May 16, 1905.

Statement by the Court. This is an action to recover for personal injuries resulting in the death of one Charles Williamson.

The defendant is engaged in the manufacture of candles. In the prosecution of its business it made use of a large number of second-hand barrels, which it purchased of a man who obtained them wherever he could, picking them up, as witnesses state, all over the city. The barrels thus gathered had been used for various purposes. Some of them had contained either machine, lubricating or cotton-seed oil, varnishes, kerosene, turpentine, naphtha or wood alcohol. There is testimony tending to show that the principal use made of them by appellant was to fill them with filtered oil, for sale as a part of the product of the fac-

tory. The barrels were examined when received, and those which were defective were rejected by appellant and taken back by the party by whom they were delivered. There is evidence that the latter was supposed to deliver to appellant mostly barrels which had contained oil, but it appears that other kinds of barrels also were accepted, including occasionally barrels which had contained wood alcohol, which appellant sometimes used to fill with glycerine for shipment. The barrels were delivered in quantities of from fifty to seventy-five at a time. Sometimes they were received by the deceased, who was employed by appellant as a cooper. When he did so receive them he was in the habit, it is said, of rejecting those which were defective in any way, and there is evidence that he also rejected barrels which he found had contained wood alcohol and which were explosive if brought into connection with fire. When barrels were thus received, they were taken by appellant's employees as soon as they were unloaded and the exteriors washed as fast as could be done. Some of them, which had contained tallow, were required to be steamed and were then taken to the wash room and washed like the others. After washing the barrels were piled up and left to dry for subsequent overhauling and repair, if need be, by the deceased, who was the cooper. In order to ascertain whether the barrels were also clean on the inside, a lighted candle was made use of, which was placed on the end of a wire and inserted in the bung hole. This candle was kept in the wash room lighted and ready for use. The deceased, Williamson, worked as a cooper in a room directly adjoining the wash room, with which it was connected by a "big sliding door." The morning of the accident appellant's foreman had set a new employee at work washing the barrels, and directed an older employee to show the new man how to do the work. The latter was shown how to use the candle, but nothing was said about the danger of inserting it in barrels which had contained wood alcohol or other explosives. The work went on as usual, and a number of the barrels had been washed and piled away to dry for the

cooper, when a barrel which turned out to have contained an explosive was brought in from the yard, thrown in the tank and washed in the usual manner. It was then taken out and the new employee inserted the lighted candle, as he had been shown how to do and had been doing with preceding barrels. An explosion followed, and the cooper, Williamson, who was working in his room and about fifteen feet away, was struck on the forehead and killed. The barrel had apparently contained either gasoline or wood alcohol.

It appears that Williamson had been working for appellant as a cooper for a number of years, and that he had been injured by an explosion similarly caused on at least one former occasion while in appellant's employment.

The jury returned a verdict in favor of appellee, and from the judgment on the verdict this appeal is prosecuted.

UTT BROS., for appellant.

DARROW & MASTERS, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is urged in behalf of appellant that there is no evidence that the place to work furnished the deceased was unsafe; that when it became temporarily unsafe, it was owing to the negligence of a fellow-servant; and that appellant is not chargeable with negligence, resulting in the accident. We do not regard the facts as sustaining the contention that the deceased and the employee whose act caused the explosion were fellow-servants. They were not at the time of the accident, nor had they been at any time, so far as appears, co-operating with each other in the work which either of them was doing. Each was employed in a separate and distinct occupation. The deceased was a skilled workman, employed in a separate room at his trade as a cooper. The other was doing the work of a common laborer. Neither was in a position at the time of the accident to exercise an influence over the other promotive of

caution for their common safety. *Illinois Steel Co. v. Bowman*, 178 Ill. 351-356. The fellow-servant rule is fully stated in *C. & N. W. Ry. Co. v. Moranda*, 108 Ill. 576-582, and reiterated in many subsequent cases. That the relation did not exist, under the evidence in the present case, is, we think, beyond legitimate controversy, and the jury could not properly find otherwise.

It is urged that under the evidence it was the duty of the deceased to inspect all barrels received, and his duty to reject not only such as were defective, but also those which contained explosive material. We do not so understand the testimony. It does appear that the deceased inspected and frequently rejected barrels, but the weight of the evidence is to the effect that he did this rather as a mechanic, whose duty it was to see that the barrels were in good condition, and that he passed chiefly upon their soundness and physical suitability, without special reference to what they had contained. If, in the course of such examination, he came across a barrel which contained explosive material or gases, he might reject it. But there is evidence to the effect that such barrels were not required to be always rejected. Some of them were retained and were used to some extent at least, to be filled with glycerine. It is apparent that the deceased was not required or expected always to receive and examine the barrels before they were washed. That was frequently done by other employees. The jury were, we think, warranted by the evidence in concluding that the accident was not chargeable to negligence on the part of the deceased.

It is urged that the risk of the particular danger which caused his death was assumed by the deceased; that this danger was obvious and apparent; that explosive barrels were often delivered; that the deceased knew a lighted candle was used for their examination; and that he was injured by a danger incident to the service in which he was engaged. That danger can scarcely be justly said to have been necessarily incident to the service. It could only result from a lack of ordinary care on the part of those en-

gaged in examining the barrels with the candle. It was certainly not a danger incident to a cooper's employment, and it is begging the question to say, as appellant's attorneys do, that "it was not avoidable by the exercise of such ordinary and reasonable care as the law required of the employer."

It is charged in the declaration that appellant negligently failed to caution or warn or advise the new employee of the danger of inserting the lighted candle in a barrel without first ascertaining what the contents of the barrel were or had been. The employee was not so instructed. The danger was well known to the employer, or should have been. The same kind of accident had occurred before. It was not a danger which an inexperienced hand, without being cautioned beforehand, would have reason to expect or anticipate. There is evidence tending to show that after some former explosion an electric light had been used for insertion into the bung-hole of the barrels to light the interiors for examination, instead of the lighted candle. We cannot say that the employer had performed his duty to the employee when, after warning from one or more explosions, by which injuries had been inflicted, his men were allowed to resume or continue the use of the candle without being instructed as to the danger of using it in barrels containing explosive material, and without being warned that such barrels were liable to be found at any time among those delivered for washing and inspection. The deceased had, we think, a right to rely upon such instruction and caution being given to those whom the employer put at this work, and it was not his duty to undertake to watch and instruct such employees, especially when new and inexperienced men were set to work there without his knowledge. He had a right to presume that when put to this work employees would be properly instructed. In *Met. R. R. Co. v. Fortin*, 203 Ill. 454, 457, it is said that the assumption of risk resulting from the careless or wrongful acts of fellow-servants is subject to the implied undertaking of the master that he will use all reasonable care to furnish safe premises and ap-

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pliances and competent and prudent co-employees. When the master fails to do this, such extra hazards are not among the risks which the employee assumes as part of his contract of service. See, also, U. S. Rolling Stock Co. v. Wilder, 116 Ill. 100-112; Pullman Palace Car Co. v. Laack, 143 Ill. 242-257; P., C., & St. L. R. R. v. Hewett, 102 Ill. App. 428, 437; Sinclair Co. v. Waddill, 200 Ill. 17-20; Chi. H. & B. Co. v. Mueller, 203 Ill. 558-564.

Complaint is made of an instruction in behalf of appellee which is, we think, subject to some criticism. The jury are not permitted to assess such damages as "in their opinion" the widow and minor children and next of kin may be entitled to. In the instruction complained of, however, the jury are told that this opinion must be formed "under the evidence in this case." While the phraseology might have been more wisely chosen, we are of opinion that on the whole the instruction was not calculated to mislead and does not warrant a reversal of a verdict which the evidence justifies. We are of opinion that the instructions requested by appellant, and which it deems improperly refused, were not applicable under the evidence. Instructions may state correct principles of law, but something more than this is requisite.

Finding no material error in the record, the judgment of the Superior Court must be affirmed.

Affirmed.

Vincent D. Wyman v. Victor Friedman.

Gen. No. 12,140.

1. **REDEMPTION**—*who entitled to.* A judgment creditor of a mortgagor has a right of redemption, notwithstanding such mortgagor had voluntarily conveyed all his interest in the property in question prior to the commencement of the foreclosure proceeding.

2. **ESTOPPEL**—*when does not arise.* The doctrine of estoppel cannot be invoked as against one who has not practiced upon another a positive fraud and who has not occupied toward such other a fiduciary relation or possessed greater means of knowledge than any other.

8. **PROMISSORY NOTE**—*when not merged in decree.* The finding in a decree of foreclosure of the amount due on a promissory note other than that secured by the mortgage foreclosed, does not merge the same in such decree.

Injunctional proceeding. Interlocutory appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Reversed. Opinion filed April 5, 1905. Rehearing denied May 5, 1905.

Statement by the Court. This is an appeal from an order entered by the Circuit Court of Cook County on August 23, 1904, enjoining appellant and Thomas E. Barrett, sheriff of Cook County, from making any sale of the premises hereinafter mentioned by virtue of a certain execution in favor of appellant Wyman and against Henry A. Harris, and of the redemption made by appellant upon said execution.

Victor Friedman, appellee, filed his bill August 20, 1904, against appellant, and Barrett as sheriff, alleging that on March 11, 1893, Henry A. Harris executed to Bernhard Ritter three promissory notes for \$1,000 each and a trust deed, which was duly recorded, securing them on lot 19 in block 8 in Brand's addition to Chicago; that two of the notes were afterwards paid, and the remaining note was assigned to George Schilling, and that the east thirty feet of said lot was released from the lien of the trust deed; that on November 19, 1894, Harris executed another note for \$3,000 and a trust deed securing the payment of the note on lot 19, except the east thirty feet thereof, and that the trust deed was duly recorded, and that this last mentioned note became the property of Cora E. Fraser; that on April 9, 1895, Harris executed another note for \$1,500 and a trust deed, which was recorded, securing it on lot 19 and other property, and that this note became the property of one Hageman, and that \$500 was afterwards paid thereon; that on May 20, 1897, one Dietsch obtained a judgment against Harris for \$689.81, which became a lien upon the property and on May 24, 1897, one Tegtmeier obtained a judgment against Harris for \$260.25, which also became a lien upon

said property; that on August 23, 1897, Harris conveyed the premises in question by warranty deed to Morris Kulnder; and on December 20, 1898, Kulnder executed his note for \$4,000 and a trust deed to secure it on the premises in question, and that this note also became the property of Cora E. Fraser; and on April 21, 1899, Kulnder executed his note for \$500 and a trust deed securing it, on the same property, and this note became the property of Hageman; that on March 28, 1899, Schilling filed his bill in the Circuit Court of Cook County to foreclose the said first mentioned trust deed of March 11, 1893, making Harris and the other parties above mentioned defendants, and in pursuance of a decree rendered in said proceedings the said premises were sold by a master in chancery on July 10, 1903, to Schilling for \$1,650, and a master's certificate of sale was issued to him; that on January 5, 1900, Kulnder conveyed the premises to Pesach Miller; and on September 27, 1901, the premises were sold to one Glos for \$93.78 for the non-payment of taxes thereon.

The bill further alleges that after the foreclosure sale above mentioned, Harris suggested to appellee, Friedman, that the premises in question were worth from \$5,000 to \$6,000, and that nearly all the liens against them and the interests therein could be acquired for less than their face value; and that if appellee should acquire the premises for less than \$5,000, it would be below the probable market value; that the only compensation he, Harris, desired for such information and his assistance in obtaining the title was, that if within a reasonable time Harris should be able and willing to repurchase the premises for \$5,000, appellee should then reconvey them to him or to such purchaser as he might produce, and to this appellee agreed; that acting upon this understanding, appellee proceeded to and did acquire all liens and judgments and interests the owners of which might or by any possibility could redeem from the master's sale; that between September, 1903, and June 6, 1904, he procured assignments of said notes and trust deeds held by Fraser and Hageman, said certificate of sale issued

to Glos, and took a deed of the premises from Miller, for all of which he expended upwards of \$2,000.

The bill further sets up that for several months prior to June 6, 1904, appellee, through his agents and attorneys, negotiated with Schilling for the satisfaction of the deficiency remaining due him after the master's sale and for an assignment of the master's certificate of sale; that during the latter part of the foreclosure proceedings Schilling was represented by the law firm of Ives, Mason & Wyman, of which firm appellant was a member; that said firm also represented the plaintiff in a certain ejectment suit instituted March 18, 1902, in the name of Theo. H. Schultz, trustee, for the use of Schilling, for the recovery of possession of the premises in question, under the trust deed held by Schilling, in which suit judgment was obtained by the plaintiff; that during said negotiations between appellee and Schilling, one E. H. Schintz, a real estate broker, represented Schilling, and that in the course of certain negotiations E. H. Schintz consulted with appellant and that appellant, at sundry times, took part in said negotiations; that appellee through his agents and attorneys informed appellant and Schintz that his purpose in negotiating for said certificate of sale was to acquire a perfect title to said lot 19, and that he had prior thereto procured either the release or assignment of all other interests in said property, the owners of which by any possibility could redeem from the master's sale.

The bill further sets out that Harris has informed appellee that there were no judgments outstanding against either himself, Kulnder or Miller, upon which a redemption could possibly be based, and that appellee acted upon the belief that the information was true and that appellee informed Schintz and Schilling and appellant in the negotiations that unless he could procure an assignment of the master's certificate of sale he would redeem the premises from the sale; that appellee finally on June 6, 1904, procured an assignment of the certificate of sale from Schilling by paying the amount due thereon, and also the amount

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of the deficiency and interest, less the rents which had been collected; that at no time until July 22, 1904, did appellee have any information or notice of any outstanding note or notes of Harris, but on the contrary had full faith and belief that none existed, and that it was under such belief that appellee purchased the certificate instead of redeeming from the sale; and of this appellant was fully aware, and yet he stood by and encouraged appellee to purchase the certificate, without giving appellee any intimation that appellant was the owner of any such note or knew of the existence thereof, or that appellant or any holder of such note intended to redeem from said sale; that appellant, in order to defraud appellee either having possession of a note or knowledge of its existence and intending to proceed upon the same, procured the entry of judgment in the Superior Court of Cook County, for \$4,015 against Harris and in favor of himself, and caused an execution thereon to be levied on said premises by the sheriff, and appellant claims to have paid the sheriff \$1,753, the amount for which the premises were sold by the master, with interest at six per centum per annum; and that the sheriff, on July 26, 1904, filed in the office of the recorder of Cook County a certificate of redemption and advertised the premises for sale and threatened to make the sale; that said levy and redemption are without right, and appellant is estopped from so proceeding and should be enjoined.

After setting out that the note on which judgment was entered by appellant was executed by Harris about March 11, 1893, and was secured by a trust deed on certain other real estate, and that by a decree of foreclosure in the Circuit Court of Cook County it was declared to be a second lien, and that the note was merged in the decree, the bill prays that the levy and certificate of redemption may be vacated and annulled, and appellant be forever enjoined from selling said lot by reason thereof.

By a supplemental record it appears that appellee filed in this cause his affidavit verifying the bill on August 22, 1904, two days after the bill was filed.

Appellant filed his answer to the bill on August 22, 1904, admitting the Schilling foreclosure proceeding and the sale thereunder, but denying that appellant had knowledge or notice, at any time, of the proceedings and transactions between appellee and Harris alleged in the bill, except that after the transfer of the certificate to appellee, appellant was informed that Harris had advanced money for the assignment, and that appellee took the assignment for the reason that Harris had been and was endeavoring to conceal his property in fraud of his creditors; that appellant had no knowledge or notice that appellee held or purchased the Fraser and Hageman trust deeds, or the quit-claim deed of the premises, or any other interest therein, except as a nominal holder of the certificate; admits that he acted as one of the solicitors for Schilling in the foreclosure case and in procuring judgment in ejectment, and that he advised Schintz, as agent for Schilling, in and about questions of rent, and the satisfaction of the deficiency decree, but that such services were rendered *gratis* and consisted merely in answering questions of Schintz as to the necessary form of making such settlement and transfer of certificate, and what would be his liability under facts stated by him; denies that appellee, through his attorneys and agents, told or informed appellant of the object of acquiring the certificate, or that appellee had procured releases and assignments of judgments, etc., or that appellee or his agents informed appellant that his object was to unite all such outstanding interests in appellee so that he would acquire a perfect title to the premises; avers that appellant had no knowledge or notice of any such matters, and that there are other outstanding judgments against Harris of record and unsatisfied; avers that all the negotiations with Schintz, concerning which appellant was informed, were had by Harris or by his attorney, and that appellee never took part in the negotiations and was never at the office of Schintz or appellant; denies that appellee informed appellant that he would make redemption from the sale unless he could obtain an assignment of the certificate, and avers that appellant was never

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aware of any faith or belief on the part of appellee that there were no other notes or obligations of Harris, and that no such knowledge or belief was ever communicated to appellant by any one; that appellant has never been the attorney for or on friendly relations with, or acted in any respect for either Harris or appellee, and has never given any advice to either of them and has never met or seen appellee; that he has never had but one conversation with Harris, and that was upon the question of his buying the certificate and letting him into possession of the property; and that since the purchase of the certificate Harris has been making improvements on the property and acting in every way as the owner; that appellant did not know of the existence of the note held by him, and did not purchase it until after appellee had taken a transfer of the certificate, and until after the time for Harris to make redemption from the foreclosure sale had expired; that in the foreclosure proceedings of *Mair v. Harris et al.*, no decree was entered ordering a sale of the premises to pay the amount due on the note, and that the finding of the amount due in no way produced a merger of the note.

The answer was signed and verified by appellant. No affidavits were filed or presented in support of the bill, except as above stated. The injunction was granted on consideration of the bill and answer, and arguments of counsel, without further evidence.

FRANK IVES and GEORGE H. MASON, for appellant.

J. G. GROSSBERG, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

Appellant contends (1) that the bill was not verified and that no evidence of any kind was offered in its support; (2) that he had a clear legal right to redeem, although his judgment was not a lien upon the premises; (3) the court, upon appellant's sworn answer to the bill denying the equities of the bill, should have denied the injunction; and (4) the bill does not establish against appellant an estoppel

to redeem, the material allegations of the bill with respect thereto being met by appellant's sworn answer.

Without stopping to discuss the first point made by appellant as to whether the bill is properly verified by an affidavit filed subsequently to the bill, we pass to the fundamental question involved in this appeal as to whether or not, under our statute, appellant had a legal right to redeem from the foreclosure sale. If he had not a legal right to make redemption, the question of practice as to the verification of the bill might be important and decisive of this appeal. If, on the other hand, appellant had the right to redeem under the uncontroverted facts presented by the pleadings, then, without reference to the question of estoppel, which we will consider later, the order must be reversed, whether the bill was verified or not.

Treating the bill, then, as duly verified for all the purposes of this appeal, had appellant the legal right to redeem?

It is admitted by the pleadings that long prior to the entry of appellant's judgment against Harris, and prior to the institution of the foreclosure proceedings under which the sale was made, Harris, the judgment debtor, had conveyed all his interest in the property in question, and that the judgment of appellant was never a lien thereon. Appellee bases his contention against the right of appellant to redeem, not upon the fact that appellant's judgment was never a lien upon the premises, but upon the fact that prior to the commencement of the Schilling foreclosure proceedings, Harris had, by a voluntary conveyance, parted with his title to the property.

It is also contended by appellant and conceded by appellee that the Supreme Court has been liberal in construing the statute so as to extend the right to redeem to all grantees and judgment creditors of the person then owning the equity in the property, and to judgment creditors of the grantees of the equity. Appellee, however, maintains that the statute does not go so far, nor have any of the decisions gone so far as to permit a creditor of one who

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had voluntarily conveyed all his interest in the property, before foreclosure proceedings or before the levy of an execution against the property, to redeem, and therefore appellant cannot redeem as he has attempted to do.

It was held in *Sweezy v. Chandler*, 11 Ill. (page 451): "It was satisfactorily answered that the judgment creditor can never redeem until the judgment debtor's rights are entirely gone, by the expiration of the twelve months within which he might have redeemed. The redemption, therefore, is never of the defendant's present estate, nor is the sale, under the junior judgment, of the defendant's interest."

A similar question to the one now before us was involved in *McRoberts v. Conover*, 71 Ill. 524. In that case John Mullaney's title and interest in the property had, by sheriff's deed, passed to Donlan & Chandler long prior to the entry of the *McRoberts* judgment, under which it was sought to redeem from a prior foreclosure sale. It was held that *McRoberts* was entitled to redeem. It is true that Mullaney, in the above case, did not part with his title and interest in the property by voluntary conveyance as Harris did, but we cannot perceive that the mere fact that title passed from the judgment debtor, by a voluntary conveyance instead of by operation of law, under a sale by a sheriff or master in chancery, can affect the question of the right to redeem.

The opinion of the court in *Fitch v. Wetherbee*, 110 Ill. 475, seems to be the most exhaustive expression of the law of this State on the question now before us to which our attention has been directed, and we find there among other expressions applicable to this case the following on page 489:

"Whoever else may redeem in such cases, it hardly admits of a doubt the judgment creditor of the mortgagor is one of the persons that may redeem under the provision of the statute.

"Plainly, then, any decree or judgment creditor of the mortgagor may redeem from the mortgage sale, where no

one having a right to redeem the property within twelve months from the date of the sale elects to exercise that privilege. And it makes no difference whether the mortgagor had conveyed his equity of redemption, or whether it had been sold on execution before the foreclosure sale. The previous decisions of this court accord with this construction of the statute."

Appellant was a judgment creditor of the mortgagor Harris and as such falls within the meaning and intent of the statute, as construed by the Supreme Court, and was, in our opinion, entitled to redeem.

It remains for us to consider whether appellant is estopped from exercising his right to redeem by anything which is alleged in the bill of complaint.

In considering this branch of the case we are disposed to treat the bill as duly verified for the purposes of the motion for the injunction now before us, whether it be so or not.

With respect to the allegations regarding appellant's conduct it must be observed that appellant was not appellee's attorney, nor did he stand in any relation to appellee which made it his duty to advise him as to the law or the facts regarding the financial status of Harris, or his outstanding obligations. Harris had assumed to give appellee information and advice regarding these matters upon which he was acting. The bill does not allege that at the time the negotiations for the purchase of the certificate of sale were progressing, appellant either held the note in question or knew of its existence. The averments of the bill are in the alternative, and neither alternative is positively stated. And further, from the facts of the case as stated in the bill, it appears that the allegation is not based on the personal knowledge of appellee in that regard; nor are any facts stated from which the court can infer such personal knowledge. As against this are the positive denials and averments of the answer. These are sworn to and on a motion for a preliminary injunction a sworn answer may be used and treated as an affidavit. The answer shows that appellant did not own the note or know of its existence until after appellee's time of redemption had expired.

It is not shown by the bill that appellee relied on anything that appellant said or did. The substance of the alleged estoppel, as we read the averments of the bill, consists in the failure to inform appellee in regard to the note on which appellant entered judgment, and its ownership at the time of the negotiations for the purchase of the certificate. These averments are fully met by the answer. Both parties appear to have known nothing about these facts at the time, and from all that the record shows their means of knowledge and information were equal. In such a situation no estoppel can be predicated upon concealment or silence. *Knapp v. Jones*, 143 Ill. 375; *Davidson v. Young*, 38 Ill. 145. In *Riss v. Hanchett*, 141 Ill. 419, it is said on page 424: "An essential of estoppel by conduct is that the misrepresentation or concealment of material facts must have been with knowledge of such facts." *Pease v. Trench*, 98 Ill. App. 24; *Bradley v. Lightcap*, 202 Ill. 168.

We do not think appellant was estopped by any facts properly averred in the bill, and the order in question cannot be sustained on that ground.

It is contended by appellee that the decree in *Mair v. Harris et al.*, set up in the bill, was a final decree, and that the Harris note upon which appellant caused judgment to be entered was merged into the decree; and if it was so merged, a mere assignment of the note, without an assignment of the decree, does not make appellant a creditor of Harris.

The bill shows that on May 26, 1900, a decree was entered by the Circuit Court of Cook County in the case of *Mair v. Harris et al.*, then pending in said court, declaring that Mair's trust deed was a first lien upon the premises therein described, and that appellant's note then owned by Adeline Lobstein, executrix, was a second lien, under the trust deed securing it, subject to the Mair trust deed, and that there was then due from Harris to the owner of the note the sum of \$3,208. Nothing is averred in the bill as to service upon Adeline Lobstein, or whether she appeared or answered, or whether any relief was prayed by her in any pleading. From what appears in the bill, Lobstein could not have obtained an execution against Harris on the decree. It was

a mere finding which would have enabled Lobstein as second mortgagee to have participated in any surplus proceeds of the sale, if any, after the payment of the first mortgage. Neither a sale of the premises nor possession thereof could be obtained under the decree. The decree gave the holder of the note no means to enforce the satisfaction of his debt, and it was in no legal sense a foreclosure of the mortgage securing the note, or a judgment thereon.

"Merger, in the law of contracts, is the absorption or extinguishment of a security of a lower legal degree in another of a higher legal degree." 20 Am. & Eng. Encyc. (2nd ed.), 596.

The holder of a note secured by a mortgage has several legal remedies, any one or all of which he may pursue, concurrently with the others or successively, until he obtains satisfaction. *Fish v. Glover*, 154 Ill. 86, and cases cited. To hold, therefore, that the mere finding in the decree of the amount due on the note, merged the note in the decree, would be to say that the greater security was merged into a less security. This we are not prepared to hold. In the case of *Brown v. Schintz*, 203 Ill. 136, plaintiff was permitted to maintain ejectment on a trust deed upon which, and the note secured thereby, it had been adjudged and decreed in the case of *Wheatman v. Brown*, a chancery proceeding in the Circuit Court of Cook County, wherein Brown and wife, Schintz, trustee, and Huber, were parties, that there was due Huber, secured by this trust deed, \$1,069.73. It is obvious that if the note was merged in that decree, so, also, was the trust deed, and no action could have been founded upon it. If there was a merger in that case, there was an entire extinguishment of all remedies upon the note and trust deed. The Supreme Court affirmed the judgment of the Circuit Court, thus in effect holding there had been no merger.

In our opinion the note in question here was not merged in the decree.

This disposes of the material questions involved in this appeal. The order of injunction is reversed.

Reversed.

Star & Crescent Mill. Co. v. Sanitary Dist., Chicago.

Star & Crescent Milling Company v. The Sanitary District of Chicago, et al.**Gen. No. 11,629.**

1. **INJURY TO REAL PROPERTY**—*when cause of action for, exists.* A cause of action has accrued to real property where the cutting off of access to and egress from such property alleged in the declaration was accomplished before the action was commenced, and where from the averments of the declaration it appears that the acts which constituted the destruction of the right of access to and egress from such property were but part of the necessary work for the construction of a bridge about to be built, although preliminary thereto, and where it likewise appeared that when the construction of the bridge, according to the plans and specifications adopted therefor, was completed, there would be no new act of prevention of ingress to and egress from such property, but that egress from and access to such property thus destroyed would be continuously maintained from the time prior to the beginning of the suit, forever and without interruption of any kind.

Action of trespass on the case. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1904. Reversed and remanded. Opinion filed May 9, 1905.

Statement by the Court. The Star & Crescent Milling Company, as the owner of Wharfing Lots 1, 2 and 3 in Block O, Original Town of Chicago, bounded on the north by West Randolph street, on the east by the South Branch of the Chicago River, on the west by West Water street, and on the south by property owned by other parties, brought this action of trespass on the case against the Sanitary District of Chicago, City of Chicago, and Jackson & Corbett Company, to recover damages for injuries to its property and property rights. The action was commenced January 30, 1902. The first count of the declaration was filed March 4, 1902. On October 5, 1903, two additional counts, called the second and third counts, were filed by the plaintiff. The defendants filed special demurrers to all three counts of the declaration. These demurrers were sustained by the court, and judgment was entered for the defendants. The plaintiff, by this appeal, seeks to reverse the judgment.

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MARTIN M. GRIDLEY and JOHN N. JEWETT, for appellant.

SEYMOUR JONES, WILLIAM BEEBE and THOMAS J. SUTHERLAND, for appellees; JAMES TODD and EDGAR BRONSON TOLMAN, of counsel.

MR. JUSTICE SMITH delivered the opinion of the court.

The question for decision presented by the record is: Does the declaration, or any count thereof, state a substantial cause of action?

The first and third counts of the declaration contain specific allegations in reference to the plaintiff's property, its character, description, location and use, its frontage on West Randolph street, the importance of the street as a thoroughfare, the main or principal entrance to the property and premises being on said street, but in other respects these counts are similar to the second count. The discussion of the question in the briefs and oral arguments before us is confined quite largely to the averments of the second count for the reason, presumably, that the averments of that count state the case most favorably to the plaintiff.

The second count alleges the ownership of the property, giving the full legal description and also by metes and bounds, the occupation of the property by the plaintiff in its business of manufacturing flour and other products of wheat, the access to it from West Randolph street and the egress from said mill and premises to said street, the great value of the free and uninterrupted use of said street to the plaintiff in carrying on its business; that without the consent of the plaintiff, and in violation of its rights, and in pursuance of a certain agreement entered into or or about July 1, 1901, between the Sanitary District of Chicago and Jackson & Corbett Company and with the knowledge, approval and consent of the city of Chicago, for the erection of a new bridge over the South Branch of the Chicago river at West Randolph street, and in accordance with certain plans and specifications made and furnished by the Sanitary District, at and after making of said agreement,

the Sanitary District of Chicago wholly interrupted the use of the bridge over the river at that point and removed the same, and proceeded to obstruct and barricade the approach to the bridge, as a part of the preparation for erecting a new bridge, and effectually preventing the use of West Randolph street in front of plaintiff's premises, as a means of access to and egress from the property of the plaintiff; and that afterwards, on the second day of January, 1902, the defendants, in further prosecution of the agreement and the plans and specifications therefor, entered upon the work of erecting the new bridge of the form and style and construction known as the Scherzer Rolling Lift Bridge, which involved the laying of deep foundations therefor on West Randolph street along and immediately in front of the plant and premises of plaintiff; and that this work entirely obstructed and prevented the use of said street as a means of access to and egress from the premises of the plaintiff; that the excavations so made for the foundations of said new bridge were within two feet of the south line of the street and the north line of plaintiff's mill, and extended along and in front of plaintiff's premises from the east line thereof to within two feet of the western boundary thereof; that said new bridge and the foundations therefor, and the approach thereto, are intended by the defendants to be, and will be permanent structures and that the damage occasioned thereby to the premises and plant of the plaintiff and to the plaintiff, is and will be permanent and lasting, and no compensation has been made to the plaintiff therefor.

The second additional count called the third count is the same as the above count with the addition of averments that according to the plans and specifications adopted for the new bridge the superstructure thereof will extend westerly from the west bank of the river along and in front of plaintiff's premises and plant to a point a short distance east of the west line thereof extended northward, and that the south lines of said superstructure will be three feet at some points and at other points ten feet from the north

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line of the premises of plaintiff, and that when the bridge is opened the superstructure thereof in front of said premises will be raised, and when closed it will be lowered again, and avers as the consequence thereof access to and egress from said premises will be prevented and destroyed and there will be vibration, dust, etc.

It appears from the declaration that at the time suit was commenced the bridge had not been placed in position, and no part of the superstructure had been erected. The actual work done at that time was the excavations for the foundations of the bridge, as a necessary part of the preparation for the erection of the bridge. The permanent improvement was not completed.

The chief contention of appellees, in argument, is that the suit is prematurely brought, for the reason that no permanent injury had resulted, or could result to the plaintiff before the superstructure of the bridge was erected.

It is conceded that, if it appears on the face of the declaration, that the suit is brought before the cause of action accrues, the point may be raised by demurrer. The question then is, did the cause of action accrue in this case before the permanent structure had been erected?

In support of their contention appellees urge that the allegations of the declaration show that the work done at the time suit was brought was preparatory work only, and it is averred to be of that character in the declaration, and that there can be no recovery for damages caused by work of a preparatory character. In other words it is claimed that the injury caused by the preparatory work, in the very nature of the case, could not be permanent; that inasmuch as there is full warrant and authority in law given to the Sanitary District to construct this bridge, and to take all preliminary steps necessary to accomplish that purpose, any preparatory acts were lawful and temporary, and could not cause permanent injury or damages.

We have examined with care the numerous authorities cited by appellees in support of their contention, but we do

not regard them as applicable to this case. We cannot take the time to point out in this opinion the particular features of each case which discriminate the cases from the case made in this declaration, but in general it may be stated that the acts done before the beginning of the suit in each case had not produced any unlawful injury, special to the property of the plaintiff, which was not common to the public generally, at the time suit was commenced, and the injury charged was consequential and speculative and might or might not follow as a consequence. In such cases it is held that a cause of action does not arise until the damages have resulted; and therefore the Statute of Limitations does not commence to run until the injury is sustained.

In the case at bar the injury, viz., the cutting off of access to and egress from plaintiff's property was done before the action was commenced; and from the averments of the declaration it appears that the acts which constituted the destruction of the right of access to and egress from plaintiff's property were but part of the necessary work for the construction of the bridge, and when the construction of the bridge, according to the plans and specifications adopted therefor, was completed, there would be no new act of prevention of access to and egress from plaintiff's property, but that egress from and access to plaintiff's property thus destroyed would be continuously maintained from the time prior to the beginning of suit forever, and without any interruption of any kind. Thus the case made by the declaration does not depend upon what may happen in the future as to the cause of action or injury complained of, but upon the destruction of the right of access to and from West Randolph street, and the right of egress from plaintiff's property to and upon said street wrought by the defendants prior to the beginning of the suit, and the completion of the work will be a continuation of the obstruction complained of.

It is not perceived from the facts alleged that there will be any new interference with plaintiff's rights when the

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bridge is fully completed that did not exist prior to the commencement of the suit, but on the contrary it does appear that there will be a continuation of the same trespass upon its rights. Therefore, as we think, the wrongful act was done and the injury was suffered when the access to and egress from plaintiff's property was first obstructed and destroyed. It is doubtless true that the damage to be recovered for the injury is more susceptible of proof now that the bridge is completed (if such be the fact), but this fact does not affect or suspend the cause of action or the right to bring suit for past or prospective damages for the injury done. That is simply a question of evidence and has no other relation to the question raised by the demurrer.

In *Northrop v. Hill*, 57 N. Y. 351, an action was brought to recover damages for an alleged deceit practiced upon the plaintiff by the defendant in inducing him to purchase certain premises by means of fraudulent representations made by defendant, who held a mortgage thereon, to the effect that there was no other incumbrance on the property, when, in fact, to defendant's knowledge, there was another mortgage on it. The suit was commenced more than six years after the fraud, but within six years after an eviction, under title acquired by foreclosure of such other mortgage, and it was held that the cause of action arose immediately upon the purchase and not when eviction occurred, and was therefore barred by the statute.

In *Wilcox v. Plummer*, 4 Pet. (U. S.) 172, assumption it was brought against an attorney to recover damages for negligence or unskillful conduct in the business of his client. In bringing suit against an indorser on a promissory note he misnamed the plaintiff and was compelled to suffer a non-suit, at which time the action was barred by the statute. The court held in the action against the attorney that the statute commenced to run from the time of committing the error of misnomer in the action against the indorser.

In *O'Brien, executor, v. Penn. S. V. R. R. Co.*, 119 Pa.

St. 184, the lower court held that no cause of action for damages to the property occasioned by the building of the railroad occurred until the completion of the work, and if the road was not completed until after the death of O'Brien, his executrix would have no right of action. The Supreme Court reversed the judgment, holding that the action might be brought as soon as the work which results in the injury complained of is undertaken, and that if the right of action was to be postponed until the work was completed, as contended by appellees here, it would be in the power of the company, by a tardy performance, to delay the action indefinitely.

In *Cass v. Penn. Co.*, 159 Pa. St. 273, it was sought to recover damages for injuries to plaintiff's property occasioned by the construction of defendant's railroad on a public street on which plaintiff's property abutted, and the court held that the plaintiff's "right of action was complete when the work commenced had progressed to such an extent as to obstruct ingress and egress to and from the property to the streets."

In support of this general proposition we cite *Penn. S. V. R. R. Co. v. Ziemer*, 124 Pa. St. 560; *Eachus v. Los Angeles, etc., Ry. Co.*, 103 Cal. 614; *Porter v. Midland Ry. Co.*, 125 Ind. 476, and *Strickler v. Midland Ry. Co.*, 125 Ind. 412.

We think that in *Lake Erie & W. R. R. Co. v. Scott*, 132 Ill. 429, and in *City of Elgin v. Eaton*, 83 Ill. 535, and in *City of Joliet v. Blower*, 155 Ill. 414, our Supreme Court inferentially, if not directly, has given its assent to the views here expressed. In the *Blower* case the exact question before us was presented to and decided by the Appellate Court, and was before the Supreme Court. That court must have been of the opinion that the action was not prematurely brought, or it would not have remanded the case. We think this action was not premature.

In our opinion the declaration and each count thereof contain all the essential averments necessary to present a good cause of action. *Stark v. City of East St. Louis*, 85

VOL. 120.] *Star & Crescent Mill. Co. v. Sanitary Dist., Chicago.*

Ill. 377; *Chicago, etc., R. R. Co. v. Payne*, 192 Ill. 239; *City of Chicago v. Jackson*, 196 Ill. 496; *City of Chicago v. Longergan*, 196 Ill. 518; *Village of Winnetka v. Clifford*, 201 Ill. 475; *Aldis v. Union Elevated R. R.*, 203 Ill. 567.

The Circuit Court erred in sustaining the demurrers to the declaration and entering judgment against the plaintiff.

The judgment is reversed and the cause remanded.

Reversed and remanded.

CASES
DETERMINED IN THE
SECOND DISTRICT
OF THE
APPELLATE COURT OF ILLINOIS
DURING THE YEAR 1905.

Albert J. Bates v. Bates Machine Company.

Gen. No. 4,467.

1. *CASE—when action of, lies.* Case lies to recover damages resulting from a breach of a written contract.

2. *CASE—when not barred by Statute of Limitations.* An action of case instituted to recover damages for the breach of a written contract may be brought within five years from the time the cause of action arises.

3. *INVENTIONS—when should be assigned.* An inventor who by virtue of his partnership contract was obligated to put into the partnership business all patents at the time owned and afterwards made by him, is, likewise, obligated to assign to a corporation succeeding, by his consent, to said partnership and its rights, all future inventions made by him within the scope of the businesses of such partnership and corporation respectively.

4. *INVENTIONS—duty of party under contract to assign.* Where a party is under contract to assign all future inventions to another, it is his duty to make full disclosure to such other of all inventions made and developed by him.

5. *DECEIT—when action lies for.* Where by contract a party is obligated to assign an invention to a corporation but fraudulently assigns the same to another and independent corporation, which successfully defends its title thereto upon the ground of its innocence in acquisition, he is liable in an action of deceit to such first-named corporation in the sum received by him for the invention so wrongfully conveyed, with interest thereon from the date of the receipt thereof.

6. *CONTRACT—what does not absolve party from obligations of.* A party is not absolved from the obligations of a contract merely by the

doing of acts which may appear inconsistent with an intention to continue such contract in force; if such inconsistent acts can in any event be taken as in effect abrogating such contract, they must be acts of no uncertain character in their inconsistency.

7. CONTRACT—*what does not cancel.* A contract by which a stockholder in a corporation becomes an officer thereof by which he agrees to serve as such officer and to assign to it all inventions made by him in the future, all for a single consideration, is not terminated by the voluntary resignation of such stockholder as such officer, in the absence of a provision in the contract providing that such result should be accomplished by a resignation.

Action on the case. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 27, 1905.

C. W. BROWN, JOHN R. BENNETT and CALHOUN, LYFORD & SHEEAN, for appellant.

C. B. GAENSEY and JOHN H. GARNSEY, for appellee.

MR. PRESIDING JUSTICE FARMER delivered the opinion of the court.

Prior to January 28, 1888, A. J. Bates, appellant here, and his brother, W. O. Bates, were owners of and engaged in conducting a shop for the manufacture, repair and sale of machinery. The business was conducted as a partnership under the firm name of Bates Brothers. They had but little capital, but were shrewd, ingenious and progressive men, A. J. Bates especially having a high order of talent for invention. On said 28th day of January, 1888, the Bates Brothers and Joseph Winterbotham entered into the following written agreement:

“BATES BROTHERS,
Machinists.

Special Machinery of all Kinds, Jobbing and Repairing,
Corner Washington and Desplaines Street.

Inventors and manufacturers of special machinery.

JOLIET, ILL., 1888.

Be it known that A. J. Bates and W. O. Bates, under the name of Bates Brothers, being desirous of extending and enlarging their present business, have united their interests with Joseph Winterbotham of Joliet, Illinois, under the following:

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Said A. J. and W. O. Bates put in their entire business, book accounts, notes, machinery, patterns, stock, etc., manufactured and unmanufactured, also all patents now in existence, and all inventions hereafter made by either the said A. J. or W. O. Bates. In consideration of the above Joseph Winterbotham agrees to put in ten thousand dollars, five thousand dollars being hereby acknowledged, the remainder being paid as needed. It is the intention and full understanding of the parties hereto that they will, at earliest practicable time, organize a stock company with a capital of twenty thousand dollars, said capital to be made up and fully represented by the assets above enumerated, and the stock distributed as follows: one-quarter to A. J. Bates, one-quarter to W. O. Bates, one-half to Joseph Winterbotham or his assigns. The name of the company to be known as Bates Brothers Co. or such other name as may be agreed upon. The officers of said company will be as follows—Joseph Winterbotham, Pres., J. R. Winterbotham, V. Pres., A. J. Bates, Secretary and Treasurer, with a salary of (\$1200) twelve hundred dollars the first year and (\$1500) fifteen hundred the second year provided business pays 15 per cent. over from its organization. W. O. Bates to be Superintendent with a salary same as A. J. Bates and the raise second year subject to same conditions. A. J. and W. O. Bates to devote their energies and inventions to the business same as they are now doing. This agreement to be in effect from the 28th day of January, 1888.

W. O. BATES,
ALBERT J. BATES,
JOSEPH WINTERBOTHAM."

In pursuance of that agreement, in February of the same year, the business was incorporated as the Bates Machine Company, with a capital stock of \$20,000. A. J. and W. O. Bates each sold to E. E. Wolcott five shares of their stock in 1891. In 1893, the capital stock was increased to \$100,000, and the increase distributed proportionately among the then stockholders. Joseph Winterbotham was elected president, A. J. Bates secretary and treasurer, and W. O. Bates superintendent of appellee. A. J. Bates was continued in the office of secretary and treasurer until the 25th day of September, 1895, when he resigned that office and was elected consulting engineer of appellee. His salary as secretary and treasurer was raised from time to time un-

til at the time of his resignation he was receiving \$2,100 per annum. The office of consulting engineer had not existed before the meeting of September 25, 1895, at which A. J. Bates resigned his office of secretary and treasurer. The record of that meeting shows the office was created at that time, "the duties of such office to be to assist when desired in taking orders and to give his best efforts to the advancement of the interests of the Bates Machine Company." The salary of the consulting engineer was fixed at \$100 per month beginning October 1, 1895. On the 28th day of May, 1895, Cory E. Robinson gave the Bates Machine Company a written order for one automatic woven wire fence machine of a design like that shown on blue prints attached, the machine to be built "according to the design and plan of A. J. Bates of Joliet, Ill., and under his direction." Robinson was to pay fifty cents an hour for labor in constructing the machine, three cents per pound for castings and the market price for all other material used. Payments were to be made the 15th of each month. The order further provided "said machine to be built at the earliest possible date and all patterns and designs for same to accompany and be delivered to the undersigned as his exclusive property. It being distinctly understood that you are to make no machine or machines for making the wire fence for any other parties without my written consent." At the same time this order was given under date of May 30th, an agreement was entered into between A. J. Bates and Robinson for the formation by them of a corporation for the purpose of manufacturing and marketing woven wire fence, with a capital stock of \$100,000 to be divided equally between them. The agreement provided that appellant should at his own expense invent and patent a machine for the manufacture of woven wire fence that would make three hundred rods of fence in ten hours, that the machine should be made at the works of the Bates Machine Company upon the order and at the expense of Robinson, and when completed should be turned over to the corporation to be organized under the agreement. The agreement

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further provided that Bates should obtain a patent in his own name (which had already been applied for), for a woven wire fence according to drawings accompanying the application, a copy of which was attached to the agreement, and turn over and transfer it also to the corporation when organized and in consideration of the transfer of these patents, \$50,000 paid up stock of the corporation should be issued to Bates and his wife. By the terms of the agreement Robinson was to pay into the treasury of the corporation \$10,000 less the cost of manufacturing the machine, and \$50,000 paid up stock was to be issued to him and his wife in full of his subscription, "it being the object and intention of this agreement to set off and equalize as between the parties hereto the cash capital of ten thousand dollars to be furnished by the party of the first part (Robinson), against the inventions, designs, patterns and improvements of the party of the second part (Bates), as aforesaid." A trial proved both the fence and the machine unsatisfactory and the machine was never completed.

The organization of the corporation contemplated under the agreement between Bates and Robinson was completed October 4, 1895, under the name of Standard Railroad & Farm Fence Company, which will hereafter be called the Standard, and after abandoning the machine that had proved a failure, work was begun on a new machine designed by A. J. Bates for the manufacture of a new design of fence invented by him also. There was no order nor agreement in writing concerning the manufacture of the new machine. Appellant testified he and Robinson, after the machine they first worked on had been abandoned, "substituted a suitable fence and machine for it so that we were able to carry out what we originally intended." The order for the machine under the contract of May 28th, was entered in the order book by W. O. Bates under date of June 1, as order number 6342 and was as follows: "One special wire fence machine, making spaces as per blue print." January 7, 1896, appellant entered in the order book, "Order 7072 C. E. Robinson special wire fence machine, drawings. Order 7073 C.

E. Robinson special wire fence machine, patterns. Order 7074 C. E. Robinson special wire fence machine, machine shop work and material." The first of these orders is explained by appellant to mean that appellee would have to make drawings for the machine before making patterns, the second that it should make the patterns after the drawings were made, and the third meant work done in the shop and material used. The new machine was completed in June, 1896, and after testing it from June 12th to July 12th, it was pronounced satisfactory and was taken from appellee's shops July 14th. July 24th Cory E. Robinson signed a paper to which was attached his order of May 28, 1895, transferring all his rights, title and interest in the contract and the machine constructed thereunder, including the pattern and designs for the same, to the Standard Company, and on the following day the latter company assigned it to the Consolidated Steel & Wire Company.

This transfer to the Consolidated Steel & Wire Company, which will hereafter be referred to as the Consolidated Company, was made in pursuance of an agreement entered into with it, September 14, 1895, by A. J. Bates, C. E. Robinson and the Standard Company. The substance of this agreement was that Bates, Robinson and the Standard Company would sell and deliver to the Consolidated Company the machinery and effects of the Standard Company, including "a certain woven wire fence machine, now being built under the superintendence of A. J. Bates, together with such patents as may be obtained on either the machine or its products." The consideration agreed to be paid by the Consolidated Company was \$40,000 cash and \$40,000 more when certain conditions specified were complied with by the other parties. As a part of the consideration it also agreed to pay Bates and Robinson the actual cost of material and supplies of the Standard Company on hand and to assume the performance of certain contracts between them and their company with other parties and cancel a contract it had with them to sell them a certain amount of wire. The contract also provided:

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"It is further understood and agreed that the Standard Railroad and Farm Fence Company will, at their own expense (except the salary of A. J. Bates as hereinafter agreed), build a certain woven wire fence machine, for manufacturing a certain woven wire fence, substantially like the drawing hereto attached, said machine to be completed at the earliest possible moment. After the completion of said machine the Standard Railroad and Farm Fence Company are to notify the Consolidated Steel and Wire Company that said machine is ready for inspection, and then at the end of thirty days' successful operation of said machine, and if the workings of the machine and product of same are satisfactory to the officials of the Consolidated Steel and Wire Company, it is agreed that the said device, improvements and patents, such as may be obtained for both the machine and its product, shall be assigned to the Consolidated Steel and Wire Company, who shall be the absolute owners of said device, patents and machine from this date; and said Consolidated Steel and Wire Company shall then pay the further consideration of forty thousand dollars (\$40,000) in cash to the said Standard Railroad and Farm Fence Company. It is understood that until the completion of this machine, A. J. Bates is to be in the employ of the Consolidated Steel and Wire Company under a salary of four thousand dollars (\$4,000) per year, and he is to give his entire and exclusive attention, services and skill to the early completion and perfection of said machine and the business of said Consolidated Steel and Wire Company."

June 12, 1896, appellant notified the Consolidated Company that the machine contemplated by the contract was completed and ready for operation according to the terms of the contract. Representatives of the Consolidated Company went to appellee's works at different times during the thirty days the machine was being tested and observed its operation. After the test was finished the machine appears to have been loaded on cars for shipment to Robinson, but it was in fact delivered to the Consolidated Company. Patents were procured on the fence and the machine for making it and were caused to be issued to the Consolidated Company "on the application of A. J. Bates, assignor," and thereafter that company claimed to be the sole owner of the patents on the machine and the fence and to have

exclusive right of their manufacture. Appellee claims that by virtue of the contract and agreement between A. J. and W. O Bates and Joseph Winterbotham of June 28, 1888, these inventions of A. J. Bates became its property and that he could not lawfully dispose of them to other parties without its consent, and appropriate the proceeds to his own use. This suit is an action on the case begun in the Circuit Court of Will County in December, 1901, against A. J. Bates to recover damages for fraud and deceit in the alleged violation of that contract. To the declaration appellant filed four pleas, viz.: first, the general issue, the second and third were special pleas not necessary here to set out for the reason that appellant was not denied the benefit of any testimony that would have been applicable under those pleas; in fact, they amounted to the general issue. The fourth plea was the five-year Statute of Limitations. A demurrer was sustained to the second, third and fourth pleas, issue joined on the first, a jury waived and trial had before the court resulting in a judgment in favor of appellee for \$55,800 and costs, from which this appeal is prosecuted.

Before the commencement of this suit appellee had brought a suit in chancery and prosecuted it to final judgment in the Supreme Court, against appellant, Robinson, and the Consolidated Company, to compel the assignment to it of the patents and rights to the inventions here involved. The Consolidated Company filed a cross-bill in that suit claiming to be the rightful owner of these patents and praying a decree confirming and quieting its title. The Supreme Court held the Consolidated Company had in good faith contracted for the inventions and paid a large sum of money thereon before notice of appellant's claim, and that the work of devising the inventions and manufacturing the machine was carried on at appellee's works under such circumstances of apparent acquiescence by appellee, and for so long a period of time before it gave notice of its claim, that it would be inequitable to deprive the Consolidated Company of the patents, and the decree of

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the Circuit Court dismissing the original bill and granting the prayer of the cross-bill was affirmed. *Bates Machine Co. v. Bates*, 192 Ill. 138.

It is first insisted that an action on the case will not lie, and secondly, that if case will lie the action was barred by the five-year Statute of Limitations and that the court erred in sustaining the demurrer to defendant's fourth plea. The right to sue in case for damages resulting from the breach of a contract is sustained by 1 Chitty on Pleading, 135, Buswell on Limitations and Adverse Possession, Sec. 215, *Nevins v. Pullman Palace Car Co.*, 106 Ill. 236, and *Howard v. Ritchie*, 9 Kan. 71. In the section above cited from Buswell it is said: "Where the tort is the result of a breach of contract, the limitation which applies to actions of contract and not that which applies to actions of tort, controls." The opinion in *Howard v. Ritchie*, *supra*, was by Mr. Justice Brewer and is as follows: "The petition sets forth a contract for services; that the services were to be rendered with care and skill; that they were carelessly and negligently performed; that in consequence thereof the personal property of plaintiff was injured, and that the carelessness and negligence was the sole cause of the injury. The transaction is alleged to have happened more than two and less than three years before the commencement of the suit. The District Court held that this action came within the provisions of the third clause of section 18 of the Civil Code, which limits to two years the bringing of actions 'for taking, detaining or injuring personal property,' and hence was barred. In this we think the learned judge erred. The action is one for breach of contract. The breach of the contract gives the right to relief. The injury to the property determines the amount of damages. The legitimate order of evidence under the petition would be, first, the contract, then the breach, and last the amount of damages. The fact that the breach of the contract resulted in injury to the specific personal property would not reduce the time within which an action might be brought below that which a

party would have in case of any other breach of contract. The time, if the contract be in writing, is five years, otherwise three. The plaintiff's cause of action was not barred, and the judgment of the District Court must be reversed."

We conclude, therefore, that the action was not improperly brought in case and that the court did not err in sustaining a demurrer to the plea of the Statute of Limitations.

It is further insisted that on the merits of the case there can be no recovery because the patents and inventions were of articles of commerce in no wise connected with the business appellee was incorporated to perform, and also because prior to their invention appellant had by his acts and conduct absolved himself from the obligation of the contracts of January 28, 1888. We are of opinion the inventions were not foreign to the business appellee was engaged in. The business of Bates Brothers as shown by their business card on the paper upon which their agreement with Winterbotham was written, was "Machinists; special machinery of all kinds, jobbing and repairing; inventors and manufacturers of special machinery,"—and it certainly was not outside of appellee's line to manufacture machines of the character here in controversy. Before the incorporation of appellee, the Bates Brothers had been engaged in inventing and manufacturing barbed wire machines. They held patents on such machines at the time the agreement of June 28, 1888, was made and under the agreement these became the property of appellee. The Bates Brothers were, as their business card states, "Machinists, Inventors and Manufacturers of Special Machinery." One of the objects of combining their skill with Winterbotham's capital was stated in the contract to be the desire "of extending and enlarging the present business." The business of the corporation as stated in the application for authority to organize was to be, "general machine and foundry work and the manufacture of tools and furnishings." That this was intended by the parties and understood by them to include the manufacture of

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barbed wire machines is not and cannot be denied. Their business included the manufacture of such machines of their own invention, or those designed and invented by some one else. We see no reason for holding that while the manufacture of barbed wire machines was in their line, the manufacture of woven wire machines was not. Woven wire fence was a development of the wire fence business and the manufacturing of machinery to make it was as much within the scope of appellee's business as the manufacture of barbed wire machines. This was recognized by the parties in the making and performance of a contract with the Ellwood Company under date of December 1, 1894, for the manufacture of woven wire fence machines designed from machines that company already had in operation, with such necessary improvements as appellee thought best to add, the drawings, patterns, improvements and patents to belong to the Ellwood Company. The machine involved in this case was a valuable invention and the control of it would have been of great profit and value to appellee, and not being outside of the scope and purpose for which appellee was organized, the agreement under which the corporation was formed obligated appellant to turn over and secure to the corporation or to such person or company as it designated, the patent, as had been previously done with numerous inventions of A. J. and W. O. Bates, unless he was released from that obligation in some manner. While it may be the manufacture and sale of woven wire fence was not within the contemplation of appellee, we are of opinion the control of a patent on a fence designed and invented to be manufactured on the machine invented by appellant would be a valuable adjunct to the right to control the manufacture and sale of the machine, and as incident to and in connection with that right it cannot be said the invention and patent of the fence was not controlled by the contract above mentioned. We do not think it an unreasonable construction of that contract to say that it bound the Bates Brothers to give to appellee the use and control of all inventions and patents designed

for, and which tended to promote the prosperity of the business in which it was legitimately engaged. Before a machine could be designed to make the fence there must be some design of a fence to be made. We can hardly imagine how a machine could be designed and manufactured to make a fence of which no design had been made or formed. If there was no fence for the machine to make, the machine would be valueless; and if there was no machine to make the fence designed, the fence would be valueless. When this contract was before the Supreme Court in the chancery suit, before referred to, that court held it to be a valid contract and legally binding on the Bates Brothers to assign to the corporation such inventions of each of them "as pertained to the special business in which the parties, through the medium of the corporation, intended to engage."

Appellant testified that W. O. Bates, superintendent of appellee, was familiar with the Robinson order of May 28, 1895, and that it was entered in the books by him. That he, appellant, designed a machine under that order and worked on it till he had enough of it completed to test it, when it was found the machine and the fence it was designed to make were unsatisfactory, and in the latter part of December it was abandoned and work begun on another machine a few days later; that the machine was manufactured at Robinson's risk and was paid for by him; that when the original machine was abandoned the new one was designed and constructed under the original order and in accordance with a personal contract between him and Robinson, which was agreed upon and prepared on the same day of the Robinson order to appellee for the machine, but which bore date May 30, 1895. Appellant offered this contract in evidence, the substance of the most material parts of which are above referred to.

The final certificate of the organization of the corporation under the agreement, was issued to it under the name of the Standard Railroad & Farm Fence Company, October 4, 1895, but was never filed for record as required by

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law. Appellant says that when the original machine and fence proved failures, he and Robinson "substituted a suitable fence and machine, so that we were able to carry out what we originally intended." Appellant testified that the Standard Company was organized for a variety of wire business, but not being ready to manufacture woven wire fence, began the manufacture of barbed wire and wire nails the last of August and ceased the 18th of September; that he superintended fitting up the Standard plant and devoted practically all his time to it from the fore part of August to the latter part of September, 1895; and that appellee furnished a good deal of the work and supplies and W. O. Bates, the superintendent, Winterbotham, the president, and Wolcott, assistant secretary of appellee, had knowledge of the equipping of the plant while it was going on. He further testified that the machine constructed under the Robinson order was intended for use by the Standard Company and that he had numerous conversations with W. O. Bates in which he told him all about his interest in the Standard Company, and what they proposed to do. He also testified that just prior to the completion of the new machine he discovered appellee was charging Robinson for his, appellant's, time; that he objected to this and gave as his reason that he was personally interested in the Standard Company and was receiving a salary from the Consolidated Company; that W. O. Bates was frequently at the Standard Company's plant on Sundays and met and talked with him and Robinson about their business. Appellant also introduced in evidence two newspaper articles published in Joliet newspapers, one under date of August 20, 1895, and one under date of September 19, 1895. In one of them it was stated that Al Bates, of the Bates Machine Company, was the principal mover in a new company which would manufacture coarse woven wire for farm fencing and the plant would be ready for operation early the next month. In the other it was stated the Standard Railroad & Farm Fence Company was the name of a concern in which the Bates Brothers were interested, and that its

product was to be woven wire fence. In September, 1895, he says the Standard Company ceased operations because it sold out to the Consolidated Company. As a matter of fact this was done before the final certificate of incorporation was issued to the Standard Company and no stock was ever issued by it. The contract of sale of the Standard Company to the Consolidated was made September 14, 1895, and is above referred to and quoted in part, and appellant testified the \$40,000 cash payment was made by the Consolidated Company about the time the contract was executed; that he told W. O. Bates about the deal before the sale was closed and showed him a check for something over \$19,000 he received from the Consolidated Company on the cash payment and told him of his employment by that company at a salary of \$4,000 per year; that the thirty days' test of the machine was witnessed by the president, vice-president, general manager and other officers and directors of the Consolidated Company at appellee's works at different times while it was in progress; that the wire used in making the test was furnished by the Consolidated Company and the fence made, delivered to and hauled away in its wagons. On the 25th of July, 1896, after the Consolidated Company had notified appellee it was satisfied with the machine, appellant, Robinson, and the Standard Company assigned to the Consolidated Company the pending application for letters patent to the invention and all improvements made or to be made thereon and requested in the assignment, that the commissioner of patents issue the letters patent and all extensions to the Consolidated Company. Appellant says he entered the employment of the Consolidated Company at a salary of \$4,000 per year, on the day after the contract of September 14th was made, and remained in its employ until the completion of the machine and so continued thereafter at the same salary; that he received his salary from that company by check and that W. O. Bates knew about it because he told him of it; that he and his brother both used the same desk and that he had there that company's letter heads, bill heads and advertising matter and did the corresponding for it from appellee's

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office, and its stenographer made copies of letters he wrote in the back part of its letter press copy book, which he sometime afterwards tore out. He further testified he did not remember to have mentioned the contract of September 14th with the Consolidated Company and his employment by it to any of the officers of appellee other than his brother, W. O. Bates, except Mr. Mott, the vice-president, and that he told him about it September 25, 1895, just before the meeting of the board of directors held on that date. On that day appellant resigned his position of secretary and treasurer of appellee and was elected consulting engineer, which position he held till February, 1897. He also said that when the machine and fence he first worked on proved to be a failure, which was in December, 1895, he told W. O. Bates he felt very badly about it because of his contract with Robinson and the Consolidated Company, and that he believed he would not tell them about it until he had tried a new design of machine and fence; that he did at once design a new fence which Robinson and the Consolidated Company agreed to accept; that he told W. O. Bates about changing the order numbers and that W. O. Bates said he did not care so long as Mr. Robinson's contract was not interfered with. The work, he says, was all done at appellee's place of business under his directions and was paid for either by Robinson, or by the Standard Company by checks to which the corporation's name was signed "by A. J. Bates." Appellant further testified that on the 25th of September, 1895, he told Mr. Mott, then a director and vice-president of appellee, about the sale of the Standard Company to the Consolidated Company, what the consideration was and of his employment by the latter company, and that he thought the subject was mentioned after the directors' meeting had adjourned in the presence of the directors, W. O. Bates, Winterbotham and Mott.

It would extend this opinion beyond reasonable limits to advert to and attempt an analysis of all the testimony bearing on this feature of the case, and we will not further attempt it.

We have read it all, oral and documentary, and the conclusions we have reached as to what the testimony proves are based on the whole evidence.

W. O. Bates, Mott and Winterbotham all deny appellant ever had the conversations with them he testified to having about his contract with and relations to Robinson, the Standard Company and the Consolidated Company. W. O. Bates testified, and is corroborated by Wolcott, that when the former saw the order of Robinson for the machine, he objected to the terms of it and stated to appellant as the work was to be done at so low a price it should have provided that appellee should have exclusive right to build other like machines Robinson might want. Appellant replied, "That is all right. You know if Robinson wants any more machines he will come here and get them because of our experience in building this one." W. O. Bates said the order did not say that, and appellant replied, "That don't make any difference. The wire is Robinson's and the fencing; we couldn't control that anyhow." This must strike any one as peculiar language if appellant had determined to absolve himself from the obligations of his contract with appellee and wanted it to have notice of that fact. If he wanted it to know of his real relations with Robinson and their objects and purposes, here was a very opportune time to have informed it. That he did not do so and not only concealed these relations and purposes, but actually misrepresented the facts, we think must be accepted as proved by the weight of the testimony. The weight of the proof also shows that the contract between appellant and Robinson of date May 30th, which was prepared at the same time and by the same attorney as the order for the machine dated May 28th, was a secret contract between the parties to it, and was never known to the appellee until long afterwards when litigation arose over the control of the inventions and patents. Appellant does not claim he ever told any one connected with appellee about the contract of September 14th between himself, Robinson and the Standard Company and the Consolidated Company until

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after the deal was closed and the cash payment of \$40,000 made. This deal was consummated several days before the directors' meeting at which appellant resigned his position as secretary and treasurer, and all those whom appellant testified he notified of it on that day flatly deny that he did so, and testify they had no knowledge then of what appellant's intentions were with reference to these inventions or that he was the author of them, or of his having entered the employment of the Consolidated Company. They knew of his being interested in the Standard Company, but did not know of any purpose it had of manufacturing woven wire. Some, or all of them, had been at its plant and all they saw was the machinery for the manufacture of barbed wire and wire nails. These men all testify that after the directors' meeting and on the same day, appellant said he had sold or was about to sell his interest in the Standard Company to the Consolidated Company. They did not, however, at that time understand he claimed or pretended that this sale included inventions of his own, which they claim under the contract belonged to the corporation. W. O. Bates testified at the time of the directors' meeting he had no knowledge of appellant being interested with Robinson in the machine, and Winterbotham testified that on the occasion of his visit to the Standard's building the day of, but after the directors' meeting was held, appellant told him he was associated with Robinson and others in the wire nail business but declined to give the names of his other associates. Mr. Winterbotham says he had spoken to appellant about his being engaged in some outside business and of his fears that he might involve appellee in some of his contracts and that this was the cause of his visit with appellant to the works. W. O. Bates testified appellant said at the meeting he had sold out his business at the Standard's work and both he and Winterbotham say appellant said he would be able in the future to devote more of his time to appellee's business than he had been doing. If appellant had severed his obligations with appellee under the contract of June 28, 1886, and if he had

entered the employment of another corporation at a salary of \$4,000 per year, why did he accept employment at a salary with appellee and express himself as being able on account of having sold out his other business, to give appellee more of his time than he had done before? It is not reasonable to suppose if appellee had known he was devoting his time to inventions of his own conception, which, when patented were to be owned and controlled exclusively by another corporation which was paying him a salary at the rate of \$4,000 per year while he was engaged in the work, and had also agreed to pay him a large sum of money for the inventions and patents completed and procured, that it would also have employed and paid him a salary during the same time. The minutes of the meeting at which appellant was employed as consulting engineer of appellee and his salary fixed at \$100 per month, recite that he is "to assist when desired in taking orders and to give his best efforts to the advancement of the interests of the Bates Machine Company." Appellant does not say that any of the officers or directors of appellee with whom he says he talked, ever said a word about his being released from his contract. That subject, according to his testimony, was never mentioned by him nor any one else. It would appear to any reasonable mind we think, that if he was engaged in developing and constructing inventions of his own conception which he believed would be of great value and did not intend the benefits thereof to accrue to appellee under his contract with it, he would not have been content to rest his right to claim absolution from the contract wholly upon such facts and circumstances as are shown by the evidence in this case. Appellant was no novice in the matter of making contracts and making business transactions of a complicated character. He is a shrewd, intelligent man, and as his testimony shows, thoroughly familiar with the English language. If he had intended appellee to know of his purpose to put an end to his obligations under the contract, he is too intelligent not to know that the best way to do it was by a direct and full

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statement and disclosure of such intention. While this may not have been absolutely necessary, and while notice might have been given by acts and declarations, we take it such acts and declarations must have been of no uncertain character. They must have been inconsistent with appellant's duty under the contract, and such that appellee could not reasonably have misunderstood his intention. The Supreme Court said in *Bates Machine Company v. Bates, supra*: "After that period (two years) either of the parties had full right to absolve himself from the contractual relations created by the agreement. But to accomplish this, affirmative action on his part was essential, either an actual declaration made to the other co-contracting parties, or some acts brought to their knowledge amounting to such a declaration, from which such notice would be imputed by law, as effectually as by an express formal declaration. The other parties were entitled to know that such course had been determined upon." The "other parties" referred to by the Supreme Court in the language above quoted, swear they did not know it and in our opinion the proof does not show any such acts and declarations as that it can be said they were bound to know it. Stress is laid on appellant's testimony that he and his brother, W. O. Bates, occupied the same desk at appellee's works and of his receiving mail there and writing letters and having them copied in the back of appellee's letter press copy book, and that W. O. Bates must have seen them. In addition to the fact that W. O. Bates testified he never saw any of appellant's correspondence or copies of letters written by him in the letter press copy book, the value of this testimony is further impaired by the testimony of appellant that after his brother had opened a letter addressed to appellee, but which was intended for appellant and related to a contemplated purchase of wire for the Standard Company, he caused mail addressed to him individually and as secretary of appellee, to be delivered to him at his residence. He also says he attempted to have this done from the date of the contract with Robinson, May 30, 1895,

up to the time of the sale of the Standard to the Consolidated Company. He says he did this because he did not consider his private business was the business of appellee. He did not conceal nor attempt to conceal the fact from appellee that he was interested at the Standard works in the manufacture of barbed wire and wire nails. The only private business he was interested in which he concealed from appellee, so far as the record discloses, was his contracts with Robinson and the Consolidated Company, and the fact that he was the inventor of the machine and fence. If he wanted and intended appellee to know of these things, why so particular about having his mail sent to his residence instead of appellee's shops where he worked? The Supreme Court said in the case referred to that "A. J. Bates could not be permitted to enjoy the benefits of the agreement and secretly absolve himself from its duties and obligations on his part;" yet it appears to us from this testimony that this is precisely what he attempted to do. Until long after the completion and patenting of the inventions, he retained his stock in appellee, continued to be a director therein and hold a salaried position. It is clear from the by-laws that it was not intended by the corporation that its stock should ever go upon the open market. By them it was provided that the directors should have a preference to purchase the stock of any one who wanted to sell. Whether this was a valid provision or not, it evidences the fact that the stock was believed to be very desirable and it was intended that it should be kept within the circle of those then interested in the corporation. It may be appellant could, if consented to by the directors and officers of appellee, be relieved from the performance of his part of the agreement of January 28th, while retaining his stock, his position as a director and as a salaried officer in the corporation and receiving all the benefits of the contract that might accrue to him as the result of his brother's inventions and the use of the capital furnished by Winterbotham. It would, however, seem a most extraordinary and unusual thing for the other parties to said agree-

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ment to consent without any consideration or benefit to them whatever, that the contract should remain in force, and binding upon all parties to it except appellant, and that as to him he should be released from its obligations, but should retain and receive all the benefits of it so far as it related to the other parties to it. A thing so unusual must be supported by clearer and a greater weight of evidence than is to be found in this record before it can be accepted as proven. While W. O. Bates was not as skillful in invention as A. J., still he was an inventor and was so recognized by the contract, and as the contract still bound him to give appellee the benefit of his inventions, by retaining his stock in appellee, appellant retained the right to share in their benefits and to participate in the management and control of the corporation. While it is true, facts and circumstances occurred during the period the machine was being perfected and completed that might well be considered sufficient to apprise appellee that the Standard Company claimed the inventions and towards the close of that period that the Consolidated Company claimed some interest in them, nothing in these facts and circumstances informed appellee that appellant was the author of them. It was appellant's duty under his contract to make a full disclosure to appellee of all his inventions during the existence of the contract. *Farwell v. Great Western Tel. Co.*, 161 Ill. 522; *Mitchell v. McDougall*, 62 Ill. 498. This he not only failed to do, but the weight of the evidence shows he concealed and misrepresented the fact of his authorship of the inventions. Under such circumstances if appellee knew of and acquiesced in the claim of the Standard and Consolidated companies to the patents, it could not have the effect to relieve appellant from the terms of his contract. Before that effect could result it must appear that appellee knew the fact of his being the originator and designer of the inventions. Such knowledge coming to appellee after the inventions had been designed and nearly completed, and after the secret contracts with the Standard and Consolidated companies for their disposal had been made, could

not prejudice its rights under the contract, to the inventions as between it and appellant.

It is also contended by counsel for appellant that his resignation, September 25, 1895, of the office of secretary and treasurer was notice to appellee that he had elected to terminate his agreement. They say no course of conduct could have been more effectual to terminate that contract than "his resignation of the employment which was the sole consideration upon which was based the obligation to devote his energies and inventions to the business of appellee." As we understand and construe the contract of January 28, 1888, appellant's employment as secretary and treasurer was not the sole nor the principal consideration for his agreement, and his duty to assign his inventions to appellee was not made to depend upon such employment. While it is true the contract stipulates who shall be the officers of the corporation when organized and what the salaries of the secretary and treasurer and superintendent shall be, these provisions are independent of the real consideration for the contract, which was that the Bates Brothers were to put in the concern the property and effects of the business they were then conducting, "also all patents now in existence and all inventions hereafter made by either the said A. J. Bates or W. O. Bates. *In consideration of the above*, Joseph Winterbotham agrees to put in ten thousand dollars," etc. There is no intimation in this agreement that if any of the parties therein agreed upon for officers of the corporation, should at any time cease to be such officer, the agreement would thereby be annulled. Moreover, appellant's retirement from the office of secretary and treasurer and the duties imposed upon that office by the by-laws was voluntary on his part. There is not the slightest evidence that his resignation was demanded or requested. For aught that appears from this record outside of appellant's own subsequent statements, his reasons for resigning were to be relieved from the exacting duties imposed upon the person holding that office by the by-laws. He had been engaged for some time in fitting up a plant ostensibly for

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the manufacture of barbed wire and wire nails. It had actually been in operation for these purposes a few days. At the directors' meeting September 25th, he told the directors he had sold out this business, but did not according to the weight of the proof tell them then or at any other time that he was the author of the inventions involved in this suit, nor that he had contracted their use and control to the Consolidated Company. Nothing occurred, so far as shown by the record of the directors' meeting, to indicate that appellant's resignation was intended or understood to have any other effect than to relieve him from the duties of the office of secretary and treasurer. At the same time he assumed the duties of another office which required him "to give his best efforts to the advancement of the interests of the Bates Machine Company." If it was intended that appellant was thenceforth to have the right to control and dispose of his inventions to whom he pleased and for his own individual account, it would seem reasonable that some mention should have been made of it in the proceedings of the board of directors. It was a matter of great importance to both parties, and especially does it look unreasonable that appellant should have failed to have some record made of a matter so vital to him. All the record that was made at that meeting is inconsistent with the claim that it was notice to appellee of appellant's purpose to withdraw from the agreement to give appellee the benefit of his inventions.

July 1, 1896, appellee having become aware of the fact that appellant was the author of the inventions and having received such information as led them to believe the Consolidated Company made some claim to them, caused a notice to be mailed to John Lambert, vice-president and general manager of that corporation, that under an existing contract, appellee claimed all inventions made or patented by either A. J. or W. O. Bates, and requesting that corporation to deal directly with appellee with regard to woven wire fencing and machinery for making it. On the 14th of the same month the machine was loaded on cars for Robinson, and W. O. Bates gave appellant a receipt for him to have Robinson sign before taking possession. Rob-

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inson refused to sign the receipt, replevied the machine and delivered it to the Consolidated Company. This appears to have brought the controversy to an acute stage and resulted in an agreement being entered into between appellant and appellee, Joseph Winterbotham and W. O. Bates, September 10, 1896, for the purpose of trying to arrive at some settlement of at least a part of the controversy. If anything were wanting to show conclusively that appellant did not understand or regard the contract of January 28, 1888, annulled by any of the parties to it previous to that time, it is found in this agreement. It recited that "Whereas, the Bates Machine Company was organized in accordance with the provisions of a certain writing now existing, dated January 28, 1888, by Albert J. Bates, William O. Bates and Joseph Winterbotham, * * * and whereas, differences have arisen between said Albert J. Bates and said corporation as to the effect of said writing, which differences it is proposed to settle amicably," and then recited that appellant had made application for letters patent for an egg-case machine and a wire barbing machine, and had also made application September 1, 1896, for letters patent for a machine for a design of woven wire fence (the last mentioned machine and the fence being the inventions here involved), and that appellee claimed the right to the manufacture, sale and use of all these inventions and that appellant denied such right to appellee, and then provided that appellee thereby relinquished any right to demand of appellant any interest in any inventions he might thereafter make and released him "from any claim had or held by it (appellee) by virtue of said writing of date Jan. 28, 1888, or otherwise, to any right to one or the other of the inventions designated hereinafter as egg-case machine or the woven wire fence machine, as it may hereafter elect in writing, leaving to said Albert J. Bates the entire, sole and complete right thereto of such machine so relinquished to said A. J. Bates." This agreement further provided that as to the wire barbing machine and whichever one of the other two mentioned appellee should elect to claim the right to under the agreement, "said writing of date Jan.

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28, 1888, shall be and remain in full force and effect." The agreement gave appellee the right to enforce whatever claims it might have in and to said inventions in any proceeding in any court it might determine upon and "to insist upon a right to, interest in, or use of said inventions, and to use for such purpose said writing of date January 28, 1888." The third clause of the agreement provided that as to the inventions appellant might thereafter make, "said writing of January 28, 1888, is hereby abrogated, annulled and cancelled." This agreement from beginning to end recognizes the existence of the contract of January 28, 1888, and is wholly antagonistic to appellant's present contention that he claimed the right to the inventions and their use and control on the ground that he had before they were invented, terminated his obligations with appellee under the contract. It seems clear to us that the real basis of his claim was that the inventions were not within the purview of the contract because they were not "such as pertained to the special business in which said parties, through the medium of the corporation, intended to engage." This proposition we have held not tenable and it then necessarily follows that the inventions and patents, therefore, belonged to appellee under contract of January 28, 1888.

If appellant is, as we hold, liable to appellee for damages, the measure of such damages adopted by the trial court was as favorable to appellant as he could insist upon. That was, the amount received by him from the Consolidated Company—\$40,000 and the interest from the date of its receipt. Upon the theory that Robinson had no knowledge of the contract of January 28, 1888, and that his means contributed to the successful development of the inventions, we are of opinion this was the proper rule for the assessment of the damages. The propositions of law held and refused by the trial court were in harmony with the views herein expressed and the judgment is affirmed.

Affirmed.

Mr. Justice DIBELL took no part in the consideration of this case in this court.

Rosa L. Thompson v. Charles H. Hoppert.**Gen. No. 4,461.**

1. **COMMON COUNTS**—*when recovery cannot be had under.* A recovery cannot be had under the common counts where it is not claimed and it does not appear that either party thereto had fully performed the express contract, which is the basis of the suit.

2. **PERFORMANCE**—*when proof of, essential to recovery.* In order to recover a sum of money claimed to be due from the defendant to the plaintiff, performance by the plaintiff of his obligations is essential to be established where such a performance is a condition precedent to the obligation of the defendant to pay, and no excuse for his non-performance will avail, where the declaration relies upon performance and does not count upon an excuse therefor.

3. **CONTRACT FOR CONVEYANCE OF LAND**—*what does not excuse performance of, by vendee.* Lack of good title by the vendor is no excuse for the failure of the vendee to make his payments as required by the contract, where the vendor is under no obligation to make any conveyance until full payment shall have been made by the vendee.

4. **REMARKS OF COUNSEL**—*when ground for reversal, notwithstanding objections thereto were sustained.* Notwithstanding improper remarks of counsel were objected to and the objections thereto sustained, they are, where of a seriously prejudicial character, ground for reversal.

Action of assumpsit. Appeal from the Circuit Court of Peoria County; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed May 27, 1905.

ARTHUR KEITHLEY, for appellant.

JOSEPH A. WEIL, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

This is an action of assumpsit brought by Charles H. Hoppert against Rosa L. Thompson and Herbert B. Dickinson, charging them as partners, by the style of The Home Savings & Investment Company. The declaration consisted of a special count and the common counts. Dickinson did not defend. Mrs. Thompson filed the general issue, and a sworn plea denying joint liability with Dickinson, and a sworn plea averring that she is not and never has been a partner of defendant Dickinson, and that at the time of the making

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of the supposed promises in the declaration mentioned, she was and ever since has been and is now a married woman, the wife of Robert Thompson; and that her said husband has not abandoned or deserted her, and is not idiotic, or insane, or confined in the penitentiary, and that he has not at any time nor in any manner, consented that she might enter into or carry on any partnership business with defendant Dickinson; wherefore she could not become, and has not become, and is not, and never has been, a partner of said defendant Dickinson, as charged. Issues were joined on the first and second pleas, and the third plea was treated as if issue had been joined thereon. There was a jury trial, and a verdict for plaintiff for \$1,261.10. Upon motion for a new trial, plaintiff remitted \$150. The motion for a new trial was denied, and plaintiff had judgment against defendants as copartners in the sum of \$1,111.10 and costs. Mrs. Thompson prosecutes this appeal from said judgment.

At a certain time prior to the commencement of this suit, Hurd and Dow were partners, doing business as the Home Savings & Investment Company, and they entered into a written contract with Hoppert. Afterwards Dickinson bought out the business, and became himself the Home Savings & Investment Company. Hoppert was in default under his contract at this time. Dickinson thereupon took Hoppert's note for the amount he was then in arrears under the contract, and caused a new contract to be prepared and executed, of the same date and tenor as the original contract, and Hoppert made further payments thereon. It is the claim of plaintiff that afterwards Mrs. Thompson became a partner with Dickinson in this business, under the name Home Savings & Investment Company. The contract was dated June 15, 1901. The contract and the attached conditions embodied a scheme by which Hoppert might become the purchaser of real estate by easy payments. The Home Savings & Investment Company was the first party and Hoppert the second party. It named \$2,500 as the purchase value and \$3,375

as the face value. Hoppert was to pay the investment company at Peoria on or before the 20th of each month, thirty cents on each \$100 of the purchase value and the same was to be credited on the face value. He was to continue such payments till he became entitled to possession of real estate under the contract. Thereafter he was to pay seventy cents on each one hundred dollars of the purchase value each month till he had paid the face value. The difference between the purchase value and the face value was to go to the first party as its compensation for its services. Hoppert therein made the first party his agent and agreed all moneys he paid in might be used according to the plans of the first party for the benefit of those entitled to purchase real estate before him. The first party agreed to number consecutively all contracts it received and accepted. Whenever Hoppert had made eight monthly payments, if he had not then become entitled to possession, he was to be credited on the contract with interest at six per cent. on those and all subsequent payments till he became entitled to possession. When Hoppert's number had been reached he then became entitled to possession of real estate if he had made eight monthly payments. The first party was then to give him thirty days' notice and he was to select a piece of real estate acceptable to him, and furnish the first party a description thereof, and an abstract of title and a fee of \$5 for the examination of the abstract. If this selection was acceptable to the first party as to title, value and terms of purchase, the description thereof was to be inserted in the contract, and it then became a contract by which the first party was bound to purchase the tract for Hoppert on twenty-four equal monthly payments, and to let him into possession as lessee. When Hoppert received possession he was to keep the property insured for the protection of the first party, pay all taxes and assessments and keep the same in good repair. If in default for ten days after he received possession and before he obtained a deed, Hoppert was to have an extension of sixty days from the date of the last payment he

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had made; and if then still in default he agreed to surrender peaceable possession without notice, and that all payments made should be considered as rent. When one-third of the face value had been paid, the first party was required to convey said real estate to Hoppert or to cause it to be so conveyed, and he was to give back a first mortgage on the real estate to secure the payment of the rest of the face value. All these payments by Hoppert were to be without interest.

It is not claimed by appellee that this contract had been performed in full by either party. He sought to prove a breach of the contract by the Investment Company. In that state of the case, he could not recover under the common counts. *Phelps v. Hubbard*, 59 Ill. 79; *Clause v. Press Co.*, 118 Ill. 612; *Parmly v. Farrar*, 169 Ill. 606; *Wilderman v. Pitts*, 29 Ill. App. 528; *Bean v. Elton*, 44 Ill. App. 442. The recovery, therefore, must be sustained under the special count, if at all.

The special count averred that defendants, on, to wit, the 15th day of June, A. D. 1901, by the name and style of the Home Savings & Investment Company, entered into a contract with plaintiff, by the terms of which defendants agreed to sell and convey to plaintiff, by good title, clear and free from all incumbrances, said lot therein described, upon being paid the sum of \$9 per month for each month after June 15, 1901, for a period of thirteen months up to July 1, 1902, and thereafter the sum of \$18.75 per month until said defendants had received upon said contract \$275; that in consideration thereof, and in pursuance of the terms of said contract, plaintiff did pay to the defendants all sums required of him to be paid by said contract amounting in all to \$225, and that he has at all times thereafter been ready, able and willing to pay the balance upon the same, according to the terms and provisions of said contract; but that defendants did not, nor did either of them, ever have any title to said premises, or any right to convey the same. It further averred that plaintiff entered into possession of said premises and that afterwards, on or

about December 6, 1903, said defendants and plaintiff were dispossessed of said premises by the true and legal owner thereof; that after plaintiff entered into possession of said premises under said contract, he expended, in materials and repairs and labor upon said property, certain moneys, and that by reason of the failure of title to said premises in said defendants, plaintiff was forced to vacate the same, and thereby was damaged, in addition to the amount paid by him to said defendants, and lost the benefit of his contract, and sustained damages in the sum of \$5,000.

There are several reasons why a recovery under this special count is not justified by the proofs. First of all, plaintiff did not complete the performance of his contract, or make all the payments required to be made by him. He does not claim to have made any payment later than that due January 20, 1903, and there is evidence tending to show that one or two payments prior to that date had not been made. What plaintiff sought to show was that facts had occurred, besides the alleged lack of title which excused him from further performance, and entitled him to recover back what he had already expended and what he lost in losing the premises. The law, however, is that in order to support a declaration averring performance, the plaintiff must prove the performance as alleged; and under such a declaration, plaintiff cannot be permitted to prove an excuse for non-performance by him; but if plaintiff has not performed, and he relies upon what he claims to be a sufficient excuse for non-compliance, that excuse must be averred in the pleadings and established by the evidence. *Higgins v. Lee*, 16 Ill. 495; *Baird v. Evans*, 20 Ill. 30; *Michaelis v. Wolf*, 136 Ill. 68; *City of Peoria v. Construction Co.*, 169 Ill. 36; *Murphy v. Nilles*, 62 Ill. App. 193. As the allegations and the proofs do not correspond, the judgment cannot be sustained.

But if the facts sought to be proved had been sufficiently averred, we are of opinion that the evidence failed in several respects to establish a legal excuse for the failure of plaintiff to continue the payments he had agreed to make.

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A vendor who agrees to convey a good title at a future date, after the completion of various payments to be made, is not required to have the title when he makes the contract, or at any time prior to the tender of the last payment. He is entitled to the entire life of the contract in which to procure the title, and it is therefore no excuse by the vendee for a failure to make any of the intermediate payments that the vendor had not acquired title. *Foster v. Jared*, 12 Ill. 451; *Monsen v. Stevens*, 56 Ill. 335; *Eames v. Der Germania Turn Verein*, 8 Ill. App. 663; and the authorities collected and reviewed in *Augsberg v. Meredith*, 101 Ill. App. 629. Moreover, the particular contract here in suit, and the scheme or plan therein embodied, did not contemplate that the Investment Company had title when the contract was made. The scheme seems to have been that when the second party to the contract had made eight monthly payments, and his contract had been reached in its numerical order, he might select a piece of real estate valued at \$2,500, and acceptable to the Investment Company as to title, value and terms of purchase, and thereupon the Investment Company would enter into a contract with the owner to purchase and pay for it in twenty-four equal monthly payments, and would let the second party into possession as lessee, and when said second party had paid one-third of the face value of the contract, then the first party would convey said premises to the second party, or procure a conveyance thereof to him, and take from him a first mortgage to secure the unpaid portion of the face value of the contract. The time, therefore, had not arrived when plaintiff was entitled to a conveyance, and therefore the fact that the title had not yet been procured did not excuse plaintiff for failing to continue his payments. What plaintiff did prove was that on January 14, 1903, the office of the company in Peoria was closed, and it did not thereafter continue doing business. Dickinson still lived in Peoria, and while it is argued that he was insolvent, and that the Investment Company was rotten, and that the investors lost their money, there is very little proof to sup-

port these propositions. If they are true and are material, they should have been proved. The evidence seems to indicate that Mrs. Thompson is wealthy, and plaintiff insists that she is a partner, and liable for the performance of his contract, and that he knew or was advised she was a partner long before he ceased making his payments. She was the owner of a bank at Bradford, in Stark county. If she was a partner, then, so far as this record discloses, the concern was far from being insolvent. Undoubtedly under this contract, after the second party had selected a lot, and the first party had entered into a contract with its owner to procure the title, and the second party had been let into possession, the second party was thereafter entitled to be protected in that possession by the first party; and if the first party failed to make payments as agreed to the owner of the lot, and because thereof the second party was evicted, the second party would be excused from making payments on this contract after the first party ceased to make such payments to the owner. Here there is no proof as to what contract the Investment Company made with Mrs. Adelman, the owner of the lot, nor when, if ever, the first party ceased making her the payments, nor when she began proceedings to oust the second party; nor is there any proof that those proceedings were against both the first party and the second party, as averred in the special count. All that is proven is that in the following December, the second party was evicted at her suit; but for aught that this proof discloses, plaintiff's failure to make the payments he had agreed may have been the very reason of the failure of the Investment Company to keep up its payments with Mrs. Adelman, if it did so fail, as to which there is no proof. To make this eviction furnish an excuse, plaintiff should have shown when the proceeding was instituted, and unless he gave notice to the Investment Company to defend the suit, or there were such circumstances as made it the legal duty of the Investment Company to defend the suit, then plaintiff would be bound to show that there had been such breach of the contract with

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Mrs. Adelman as authorized her to sue for and recover possession of the premises.

It seems that before the trial of this case, a suit had been brought against these defendants by some other person, and that the present attorney for Mrs. Thompson was an attorney for the plaintiff in that case. The plaintiff in this suit, at various steps of the trial, sought to turn this fact to the disadvantage of Mrs. Thompson. An effort seems to have been made to try her present attorney for unprofessional conduct in taking different sides of the same question in different suits, and a bitter attack upon him was made in the closing address to the jury by plaintiff's counsel. All of this was improper. If counsel for Mrs. Thompson had been guilty of any unprofessional impropriety in taking this case, in view of his former relations to another case, that fact had no tendency to make a cause of action against Mrs. Thompson in this case, and its use before the jury was improper and highly prejudicial to her. The court sustained objections to the improper remarks made in the closing address to the jury, but counsel for the plaintiff continued the same line of argument, notwithstanding repeated rulings of the court against him. It may be that counsel for Mrs. Thompson also made improper remarks, but the court should not have permitted any of this line of conduct by counsel on either side, and our conclusion is that the case of Mrs. Thompson was highly prejudiced thereby.

Several other questions were presented and earnestly argued, but as they are not likely to arise again in the same form, we deem it unnecessary to discuss them. For the reasons above stated the judgment is reversed and the cause remanded.

Reversed and remanded.

Thomas Cratty v. The Peoria Law Library Association.

Gen. No. 4,412.

1. **DIVIDENDS**—*when by-law providing for payment of, ultra vires.* A by-law of a corporation organized either for pecuniary profit or not for pecuniary profit, which guarantees to stockholders an annual dividend, is *ultra vires* and void.

2. **DIVIDENDS**—*by-law providing for payment of, construed.* A by-law providing for the payment of an annual dividend will not be so construed as to render its performance of such a character as would practically defeat the purposes of the corporate organization, and in such connection will not be so construed as to constitute an obligation to be discharged in advance of running expenses.

3. **DIVIDENDS**—*jurisdiction of equity to order.* Equity has jurisdiction in a proper case to compel directors to declare and pay a dividend.

4. **SECRETARY OF STATE**—*what corporations not obligated to report to.* Corporations organized not for pecuniary profit are not required to make to the secretary of state the annual report provided by the act of May 10, 1901.

5. **ESTOPPEL**—*when, arises by pleading.* A pleader is estopped to urge that a corporation was organized not for pecuniary profit where by his bill he substantially alleges that it was organized for pecuniary profit.

6. **DIRECTORS**—*extent of liability of.* Officers of a corporation are not held to a strict accountability that every disbursement of corporate funds made by them for legal purposes, is at their peril or personal responsibility in case a court, sitting to review the internal management of such corporation, shall reach a conclusion that the funds ought to have been employed for a different purpose. Such an officer only engages for good faith, fidelity and honest service.

Bill for accounting. Appeal from the Circuit Court of Peoria County: the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 27, 1905.

JUDSON STARR, for appellant.

J. H. SEDGWICK, F. H. TICHENOR and GEORGE T. PAGE, for appellee.

MR. JUSTICE VICKERS delivered the opinion of the court. This is an appeal from a decree of the Circuit Court of Peoria County sustaining a demurrer to and dismissing appellant's bill. Since the sufficiency of the bill is the only

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question for determination, it will be necessary to set out its substantial averments. The bill alleges that prior to January 6, 1879, appellant, who was then a lawyer engaged in the general practice of his profession in Peoria, together with sundry other members of the Peoria bar entered into a written agrément to organize a law library association; that it was agreed that such association should be organized, and that the lawyers who became stockholders should put in their private libraries at a fair appraisal, and receive stock in the association at par for the value of their several contributions. It was also specified in this preliminary agreement that the stockholders should receive an annual dividend of eight per cent. on the face value of such stock and that the same should be provided for in the by-laws of the association when organized. On January 6, 1879, the association was duly incorporated as The Peoria Law Library Association, and thereupon proceeded to adopt by-laws for its government. The only sections of the by-laws that have any bearing on this controversy are sections 12, 15 and 16 which are set out in full in the bill as follows:

“Sec. XII. The association guarantees to every stockholder a dividend of eight per cent. per annum on the amount of paid in stock held by him or them from the date of such payment, which dividend shall be a charge against the association, and the production of the certificate of stock, or receipt of payment, shall entitle the holder to the amount of such dividend; such dividend shall be due and payable on the first day of January in each year.”

“Sec. XV. The Board of Directors shall fix the annual dues of members at such an amount as may be necessary to raise a sufficient sum annually to pay, 1st, a dividend of eight per cent. per annum on the paid in capital stock of the association; 2nd, the necessary expenses of the association; 3rd, to keep up the continuation of all the reports and legal periodicals owned by the association; and 4th, to purchase new books and legal publications.”

“And shall grade membership into four classes: The first to be composed of all practicing attorneys who have been admitted to practice for ten years; the second, those who have been admitted for five years; the third, those who have been admitted less than five years, and all attorneys

not engaged in practice; and the fourth, of all students, and other persons desiring membership."

"Sec. XVI. That until otherwise provided by resolution, to be entered upon the records of the association, the annual dues for the respective grades of membership shall be as follows :

Members of the first class.....	\$80
Members of the second class.....	60
Members of the third class.....	40
Members of the fourth class.....	20

"All dues must be paid quarterly in advance, on the first day of January, April, July and October in each year;

"Provided that whenever any change is made in the amount of annual dues to be paid, said resolution shall be passed at least sixty days prior to the commencement of the quarter at which the same is to take effect, and sixty days notice thereof prior to said change shall be given to each member; and provided also, that attorneys not residing or having offices in the city of Peoria may be admitted at half the regular rates."

The bill alleges that appellant was the owner of a large and valuable law library, consisting substantially of all the Federal, State and Territorial reports and a large and valuable line of text books, in all over 2,000 volumes, which he turned over to appellee and received certificates of stock for twenty-one shares of the capital stock of the association, in part payment for his library, the balance having been paid in money or its equivalent. Appellant charges that he became a member of the association of the first class mentioned in by-law 16, and thereafter paid annual dues at the rate of \$80 per year and received his eight per cent. dividends or interest until May 1, 1880, when appellant removed from Peoria to Chicago, since which time he has paid no dues and received no dividends, although he has often requested payment of such dividends.

It is alleged that the association continued for a number of years to pay the eight per cent. to stockholders resident of Peoria after it refused to pay appellant. It is charged that these annual payments are accumulative and that there is now due appellant a large sum of money on account of these accumulated dividends and interest thereon amount-

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ing to more than \$3,000; that the association has collected large sums of money in annual dues from the members of the association, the amount of which is not known to appellant, but it is charged that the money thus collected amounts to many thousands of dollars; that appellant has repeatedly sought to have an accounting with appellee of the moneys collected and disbursed and the amounts due appellant, but appellee has refused to come to an accounting or to pay anything whatever to appellant, claiming that it had no funds available for such purpose, and that the entire income of appellee from dues was required to pay expenses and for the continuations of reports and periodicals and to buy new books. Appellant charges that these disbursements of money were illegal and in violation of the contract entered into and set out in the by-law, and that the eight per cent. dividend or interest on stock was a preferred and fixed charge upon the association, which should have been paid first as classified in section 15 of the by-laws, and that the diversion of the funds to the other purposes mentioned in said by-law was illegal and in violation of the trust relation of the officers and managers of appellee, which makes them personally liable to appellant and gives him a right to follow such funds and have a lien established on the books bought and paid for with these funds.

It is also charged that the association is not serving the purpose for which it was organized; that the lawyers of Peoria are not using the library generally and that the receipts from dues have fallen off to a large extent; that the stock is depreciated and is being bought up by a few persons, who use and control the library, and that there is no prospect that the association will ever be able to carry out its contract with appellant and other stockholders.

It is alleged that the association has failed and neglected to hold any meetings of stockholders since 1895, and that there has been no directors elected since that date.

It is charged that the association failed to make its report to the secretary of state as required by the law of 1901, and that in consequence the Secretary of State had, on July

1, 1902, canceled the charter of the association as required by said act.

In consequence of these facts it is claimed said association has no right under the law to continue a pretended existence for the transaction of any business, and that its affairs ought to be wound up, and its assets divided among its stockholders according to their respective rights. It is charged that James H. Sedgwick claims to be a creditor of the association, but it is averred that he became such creditor by purchasing a past due note from Lydia Bradley, which was acquired while Sedgwick was a director, and that he had full knowledge of the transaction and participated in the wrongful misappropriation of the funds which ought to have been used to pay said note, and appellant insists the note should not be paid as against the rights of appellant.

It is averred on information and belief that F. H. Tichenor, L. D. Puterbaugh, J. M. Rice, George T. Page and James H. Sedgwick are the present directors and managers of said association, and that said Puterbaugh is its president, Tichenor its secretary and Sedgwick its treasurer. It is stated also on information that O. J. Bailey, David McCulloch, William Jack, J. S. Stevens and J. S. Starr are stockholders in said association, but the amount of stock held by each is unknown to appellant. The association in its corporate capacity and the above named individuals are made parties defendant to the bill.

The prayer of the bill is that an accounting may be had of the matters and things charged in the bill, especially of the amount due appellant and the amount due any other person, and for a discovery of any other person who may be interested either as stockholder or creditor with leave to make such persons, if any, parties defendant when ascertained; that an investigation may be made as to what persons acting on behalf of the association have contracted any indebtedness in its name for expenses, books, periodicals or borrowed money, and that an accounting may be had of the amount paid out for books or other publications

by the association, the location and value of such books; that a decree may be entered against the association for the full amount due appellant on his stock and fixing the liability of such persons as may have diverted or misapplied the funds of the association and praying for a first lien on any books or publications that may have been purchased by the association or any of its officers with its funds; that any indebtedness against the association be disallowed, especially if held by any officer or stockholder, and that no indebtedness be paid until appellant is paid in full; that the association shall be dissolved and its affairs wound up and its effects distributed to appellant and such others as may be entitled to them; that a receiver be appointed to marshal the assets and wind up the affairs of the association and for an injunction against the directors from using the dues except as required by the by-laws, and for general relief.

Several of the defendants answered the bill admitting that appellant is entitled to the relief and claiming the same relief for themselves. The others, including the corporation, demurred to the bill, which was sustained and appellant electing to abide by his bill; a decree was entered dismissing the same and against appellant for costs, from which this appeal is prosecuted.

The case presented by this bill against the corporation is predicated upon the assumption that the by-law which guaranteed eight per cent. dividend per annum, created an unconditional obligation to pay this charge regardless of its ability to do so out of its income; and that the corporation having failed to meet this obligation to appellant until the accumulated dividends and interest amounted to over \$3,000, an accounting should be had, a receiver appointed and the assets sold and distributed among the persons entitled thereto. Appellant's construction of by-law number 12 is the foundation of his conclusions of legal responsibility. Upon it he rests the liability of the corporation as well as that of the officers and managers. If the foundation is removed the legal structures erected thereon

will come down of their own weight. What is the meaning of by-law number 12? It guarantees an eight per cent. dividend on the amount of paid in stock, which dividend shall be due and payable on the first of January of each year. "A dividend is a corporate profit set aside, declared and ordered by the directors to be paid to the stockholders on demand or at a fixed time." Cook on Corporations, sec. 534; King v. Paterson, etc., R. R. Co., 29 N. J. L. 82; Lockhart v. VanAlstyne, 31 Mich. 76. The above definition of the word "dividend" is supported by many authorities. In Mobile & Ohio R. R. Co. v. Tennessee, 153 U. S. 436; the word is defined as follows: "The term dividend in its technical as well as its ordinary acceptation, means that portion of its profits, which the corporation, by its directory, sets apart for ratable division among its shareholders." See also, Boone on Corporations, sec. 125; 2 Thompson on Corporations, sec. 2126.

A dividend is not a debt until it is declared and set apart. 2 Thompson Corp. sec. 2127; Lockhart v. VanAlstyne, *supra*. It is, however, contended that the use of the word "guarantee" in connection with the word dividend changes the meaning and converts a dividend, which in its very nature can have no legal existence outside of profits, into a fixed and unconditional liability wholly independent of any pre-existing profits. The relation of appellant and the corporation is clearly that of stockholder and stock company. It is not the relation of debtor and creditor. The issuing of stock by a corporation with a guarantee of a fixed rate of dividend payable at fixed times, only creates a charge upon all accruing profits at the stipulated rates, and is to be paid before any dividends can be paid on stock not thus preferred. Henry v. The Great Western Ry. Co., 3 Jurist, part 1, p. 133; Taft v. Hartford, Providence & Fish Kill R. R. Co., 8 R. I. 310. In Crawford v. North Eastern Ry. Co., 3 Jurist, pt. 1, p. 1093, Vice-Chancellor Wood, speaking of guaranteed dividends said: "Of course, I do not mean to say that it is a guaranty in any other sense than that you are to be paid these sums out of the

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profits of the company. That is the only fund you are to look to. If the company makes no profits you will have no dividend." Clearly if the by-law in question be held to be a contract between the corporation and the shareholder, it can only be held to be a contract to pay the dividend out of the profits. But it is argued that the corporation was not organized to make profits, that it was a library association organized, it is said, to furnish its members and patrons with a law library such as they could not individually afford. It is said the scheme of the association is such that it may well be treated as organized under the statute relating to corporations "not for pecuniary profit." If this contention prevails, then what becomes of the by-law upon which appellant rests his right to maintain his bill? Can an association organize under the statute, "not for pecuniary profit," and then issue stock to all its shareholders and guarantee eight per cent. dividends annually? If this be good law it is a matter of surprise that all corporations do not avail themselves of this easy method of avoiding the onerous fees of the secretary of state and the burdens of taxation on their stock. If this association is organized under the law relating to corporations "not for pecuniary profit," then the by-law in question is *ultra vires* and void and appellant has no standing in court. Section 33 of chapter 32 relating to Corporations "not for pecuniary profit," expressly prohibits the payment of any dividend or any distribution of its property until all its just debts are paid, and then only upon the final dissolution of the corporation and surrender of its organization and name.

The bill in this case charges that the charter of the corporation was forfeited by its failure to make reports as required by the by-law of 1901 relating to corporations and requiring them to report to the secretary of state and that its charter was canceled on July 1, 1902, for failure to report. Appellant contends that this is an additional reason why a receiver ought to be appointed and the affairs of the corporation wound up. Corporations organized "not for pecun-

itary profit" are not required to report under the law of 1901, but are expressly excepted by section 2 of said act. The bill charges that the law of 1901 required "all corporations of the character or class in which said association stood to make certain reports annually to the secretary of state." This is an admission that this association was not organized under the law relating to corporations "not for pecuniary profit," and should estop appellant from insisting to the contrary. *Hull v. Johnston*, 90 Ill. 604.

If appellant's contention is sustained the practical effect of it would be to divide a portion of the capital annually among its stockholders in case its profits were too small to meet the necessary running expenses, keep up its reports and pay eight per cent. on all the outstanding stock. It is absurd to suppose that it was the intention of the persons who organized this library association to pay eight per cent. dividends annually even if the books of the library had to be sold to raise the funds to pay it. Even if the language of the by-law was such that no other interpretation could be put upon it, then it would be illegal and void since in effect it would be indirectly dividing the capital stock among the stockholders, which under the law cannot be done except on final dissolution of the corporation and after all its debts are paid. 2 *Thompson on Corporations*, sec. 2236; *Pittsburg R. R. Co. v. Alleghany County*, 63 Pa. St. 126; *Ohio College v. Rosenthal*, 45 Ohio St. 183.

Properly construed the by-law in question will be a help rather than a hindrance to the attainment of the purposes of the corporation, but if it be held to create an ever increasing debt with its accumulations of interests, which must be paid at all events, even at the expense of regular and constantly increasing impairments of the capital stock, it becomes an insupportable burden which will impede the progress, defeat its objects and finally plunge the corporation into financial ruin and insolvency. Appellant seeks to support his contention by the fact that by-law number 15 provides that the board of directors shall fix the dues of members at such a sum as shall raise a sufficient amount to pay (1) a dividend of eight per cent.; (2) necessary expenses of the

association; (3) to keep up the continuations of all reports and periodicals; and (4) to purchase new books. It is assumed that because the eight per cent. dividend is the first mentioned among the purposes for which the dues shall be used, that no part of the funds could legally be applied to either of the other purposes until the dividends were provided for. How could this association hope to exist without library rooms and some one to care for the books? This means necessary expenses, besides lights, heat and taxes must be paid in order to realize the objects of the association. Then all lawyers understand that the continuations of reports and additions of new books and new editions of old ones, are indispensable to make a law library valuable. Still in the face of these very essential needs, appellant's contention is the eight per cent. dividend must be paid before heat, lights, rents and taxes. No such unreasonable meaning is to be attributed to the language employed in these by-laws.

While we have so far only considered the case made by the bill as specifically applicable to the corporation, yet it is manifest that what has been said virtually disposed of the cases as presented against the officers and managers. Since, as we have seen, the by-laws did not create the absolute duty to pay the dividends regardless of the ability of the officers to do so and meet other necessary and proper expenses, it follows that the officers and managers were guilty of no wrongful diversion of trust funds, in their hands to be disbursed, and there can, therefore, be no grounds to rest a personal liability upon or against them. There is no charge of fraud or bad faith against the directors. There is nowhere a suggestion that one of them ever received a penny for his services or that any one of them has made or sought to make any profit for himself out of his relations to the company. If it be granted that the directors owed the duty to apply all of the money they received on dividends, to the exclusion of other proper demands, if they acted in good faith and with the honest purpose of serving the best interests of the association, in applying the funds to some other proper corporate purpose,

they cannot be held personally liable. Officers of corporations are not to be held to a strict accountability that every disbursement of corporate funds made by them for legal purposes, is at the peril of personal liability in case a court, sitting to review the internal management, shall reach a conclusion that the funds ought to have been paid for another purpose. While the position of director in such an association is representative and fiduciary, such officer is not an insurer against the fallibility of his judgment. He engages only for good faith, fidelity and honest service. If the law was otherwise few men could be found who would assume a relation carrying such responsibilities. In the following cases the views above expressed find support: *The Charitable Corporations v. Sutton*, 2 Atk. 400; *The York & North Midland Ry. Co. v. Hudson*, 16 Beavan, 495; *Williams v. Page*, 24 Beavan, 661; *Turquad v. Marshall*, 5 Chancery Appeals (Law Rep.), 386; *Lexington & Ohio R. R. Co. v. Bridges*, 7 B. Monroe, 556; *Godbold v. Branck Bank at Mobile*, 11 Ala. 191; *Hodges v. New England Screw Co.*, 1 R. I. 312; *Neall v. Hill*, 16 Cal. 146; *Speering's Appeal*, 71 Pa. St. 1.

Ordinarily, the matter of declaring dividends, as well as all other matters relating to the management of the corporation are left to the sound discretion of the managing agents, still in a proper case the law seems to be that a court of equity may take jurisdiction to compel the directors to declare a dividend and pay the same. 1 *Morawetz Pri. Corp.*, sec. 276; *Beers v. Bridgeport Co.*, 42 Conn. 17; *Scott v. Eagle Fire Co.*, 7 Paige, 203.

But the bill before us is not a bill to compel the declaration of a dividend; on the contrary, the court is virtually asked to declare the dividend, compel its payment and punish the directors and managers by holding them personally liable for not having made a disbursement of its funds to the appellant. There is no view in which the bill can be sustained and the demurrer was properly sustained thereto.

The decree is affirmed.

Affirmed.

CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURT OF ILLINOIS,
DURING THE YEAR 1905.

Elizabeth White v. City of Chicago.

Gen. No. 11,966.

1. *SIDEWALKS—extent of municipal liability for safe condition of.* A municipality is not an insurer against possible accidents upon a public highway, nor is it bound so to construct its streets that no accidents can happen thereon; if it uses reasonable care to make and to keep its streets in a reasonably safe condition for the use of those who are exercising reasonable care for their safety in passing over them, it has done its whole duty in that regard.

2. *CONTRIBUTORY NEGLIGENCE—when pedestrian guilty of.* A pedestrian who knows that a certain part of a street is in a dangerous condition, and notwithstanding this knowledge, persists in passing over it, when another and safe way is convenient, does so at his peril; he cannot knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution.

3. *CONTRIBUTORY NEGLIGENCE—when person injured while attempting to save life of another, guilty of.* While the general rule is that one who exposes himself to danger in an attempt to save the life of another is not guilty of contributory negligence, yet where the danger of such other was induced by the voluntary act of such person, the doctrine of contributory negligence applies.

Action on the case for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. HOMER ABBOTT, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 29, 1905.

Statement by the Court. This is an action for personal injuries. At the close of appellant's evidence the court instructed the jury to find a verdict for appellee. From the judgment entered on that verdict this appeal was perfected.

Talman street runs north and south in the city of Chicago. Appellant at the time of the accident lived, and for two and one-half years prior thereto had lived, on the east side of this street in the middle of the block lying between Milwaukee avenue and Pleasant place. The plank sidewalk on the west side of Talman street opposite her residence was in good condition. It was placed next the lot line and was six feet wide. Between it and the curb of the roadway there was a space of about eight feet in width which had not been filled to the level of the curb and walk. In the middle of the block, in front of the premises of a Mr. Hahn, and directly opposite to the residence of appellant, two planks, each ten inches wide, lying side by side, extended from the sidewalk to the curb. The surface of the ground under and in the vicinity of these planks was nearly three feet below them. There was no street crossing at that point. Appellant was perfectly familiar with the situation. She had passed over these planks many times. At 11:30 A. M. of June 14, 1898, appellant accompanied by her three year old child, crossed the street from her home over these planks to the west sidewalk, along which she passed to a grocery. After making some purchases she started back along the west sidewalk, intending again to cross these planks in order to reach her home. When near the planks her child let go the mother's hand and apparently started over the planks alone. In endeavoring to overtake the child appellant lost her balance and fell off the planks to the ground below and thus received the injuries of which she complains.

LORIN C. COLLINS, for appellant.

JOHN F. SMULSKI, City Attorney, for appellee; ROBERT S. COOK and WILLIAM S. KIES, of counsel.

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PER CURIAM. The planks in question extended out from the sidewalk over the parkway to the roadway. They were placed there for the convenience of any one desiring to pass from the Hahn house to the roadway or from the roadway to the house. Who put them in place is not shown by the record. Not being a part of the sidewalk proper, it cannot be presumed that the city laid them down. At each end of this block there was a regular cross-walk over which persons wishing to cross the highway could do so with safety. Appellant knew the entire situation. She knew the width and length of these planks. She knew that they spanned a depression some three feet in depth. She was in the habit of going that way. It was midday when the accident happened. Everything was in plain view. The city is not an insurer against possible accidents upon a public highway, nor is it bound so to construct its streets that accidents cannot happen. If it uses reasonable care to make and to keep its streets in a reasonably safe condition for the use of those who are exercising reasonable care for their personal safety in passing over them, it has done its whole duty in that regard. City of Chicago v. Glanville, 18 Ill. App. 308; City of Aurora v. Pulfer, 56 Ill. 270; City of Quincy v. Barker, 81 Ill. 300; City of Chicago v. Bixby, 84 Ill. 82. The city has performed its full duty when it has provided a safe sidewalk for those who endeavor to keep on it and to leave it at such points only as have been provided for that purpose. ✓

The pedestrian who knows that a certain part of the street is in a dangerous condition, and notwithstanding this knowledge persists in passing over it, when another and a safe way is convenient, does so at his peril. He cannot knowingly expose himself to danger, and then recover damages for an injury which he might have avoided by the use of reasonable precaution. Centralia v. Krouse, 64 Ill. 19; Lovenguth v. Bloomington, 71 Ill. 238; Butterfield v. Foster, 11 East, 60; Wilson v. City of Charleston, 8 Allen, 137; City of Sandwich v. Dolan, 133 Ill. 177; Chicago v.

Richardson, 75 Ill. App. 198; City of Erie v. Magill, 101 Pa. St. 616.

In *City of Peoria v. Walker*, 47 Ill. App. 182, appellee drove his horses along the street into a place where certain ditches were being dug, and where his horses might be frightened by a passing street car, when he could have passed along another part of the street easily and safely. One of his horses did become frightened, and appellee in jumping from his wagon was injured. The court say: "He ought not to have placed himself in a position where, by the frightening of his horses, he would be in peril, and more especially where there was a safe way open,"—and therefore reversed the judgment against the city and remanded the cause.

In the case at bar the accident in question was brought about by the negligence of appellant. A few minutes prior to her injury she had led her child over these planks, and on her return she was again approaching them with the intention of re-crossing upon them. The natural inclination of the child to return the way it came, led it to pass from the sidewalk to and upon the planks when it reached them. The danger, if any, to the child, in crossing the planks ahead of the mother was fully known to appellant. In our opinion appellant, under all the circumstances of the case, was guilty of such negligence as deprives her of a right of recovery. *C., W. & V. Coal Co. v. Moran*, 210 Ill. 17; *C. Ry. Co. v. Canevin*, 72 Ill. App. 86. It is a humane provision of the law that negligence which precludes a recovery is not imputed to one who voluntarily exposes himself to danger in an attempt to save the life of another. *Eckert v. Long Island Ry. Co.*, 43 N. Y. 502; *Penn. Co v. Langendorf*, 48 Ohio, 316; *Donahoe v. W. St. L. & P. Ry. Co.*, 83 Mo. 560; *Gibney v. State*, 137 N. Y. 1. There is, however, an exception to this rule. If the party injured was guilty of negligence in bringing about the perilous situation, that negligence will prevent his recovery.

In *Air Line Ry. Co. v. Leach*, 91 Ga. 419, the deceased, having with him a small boy, was crossing a long high rail-

way trestle, when they were about to be overtaken by a rapidly moving train. In his effort to save the boy the deceased was killed. In reversing a verdict recovered by his representative, the court say: "Whatever may be the law with reference to the liability of a railroad company for injuring or killing one who exposes himself to risk and danger by attempting to rescue another in a perilous situation which he had nothing to do with bringing about, certainly when one directly or by his own negligence causes the peril to exist, and because of it exposes himself to danger, he has, as against the company, no excuse for so doing."

In *E. & C. Ry. Co. v. Hiatt*, 17 Ind. 102, a father and son were walking on a railway track when a train approached them. The son stepped off the track, but the father, being old and infirm, did not. Thereupon the son returned to the track and rescued his father, but in doing so he was struck by the train and one of his legs was so badly fractured that it had to be amputated. The Supreme Court held that, there being no negligence shown upon the part of the railway company, the negligence of the son in continuing so long upon the track, if not, indeed, in going upon it at all, under the circumstances, precluded his recovery.

In the case at bar the dangerous position in which the child placed itself, and from which the mother attempted to rescue it, was brought about by and through the negligence of appellant.

The case of *Hogan v. City of Chicago*, 168 Ill. 551, cited by appellant, is not in point. There the new sidewalk for its entire width ended abruptly, the walk beyond being three and one-half feet lower than the level of the sidewalk. A plank was placed leading from the lower level to the higher. When the plaintiff attempted to pass down this plank it slipped off the new sidewalk, causing her to fall. The Supreme Court held that the sidewalk was in an unsafe condition, and that the negligence, if any, of the plaintiff in attempting to pass down this plank, which was a continuation of the walk, was a question for the jury.

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In the case at bar the city had furnished a safe and sufficient sidewalk for those who desired to travel along it, and had also provided safe and convenient cross-walks for those who desired to cross to and over the roadway.

The judgment of the Circuit Court is affirmed.

Affirmed.

Presiding Justice BALL: In my opinion the facts of this case should have been submitted to the jury.

Masonic Fraternity Temple Association v. City of Chicago, et al.

Gen. No. 12,879.

1. APPELLATE COURT—*when without jurisdiction.* The Appellate Court has no jurisdiction of an appeal which brings up for review the question of the constitutionality of an ordinance.

Injunctional proceeding. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1905. Appeal dismissed. Opinion filed May 29, 1905.

DUPEE, JUDAH, WILLARD & WOLF and ALLEN G. MILLS, for appellant.

JOHN W. BECKWITH and WILLIAM H. SEXTON, for appellees; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

Appellant filed a bill alleging that appellees forcibly and without right had closed certain assembly halls in its building, known as the Masonic Temple, for alleged violations of a city ordinance relating to stairways. A temporary injunction was issued, which upon hearing was dissolved, and the bill and supplemental bill were dismissed for want of equity.

Upon appeal it is contended by appellant that said ordinance, so far as it is intended to govern and regulate its building and the halls therein and the use and enjoyment of the same, is null and void because it violates the 5th and the 14th Amendments to the Constitution of the United States, and Section 2 of Article 2 of the Constitution of the State of Illinois, and takes and deprives appellant of its property and its use and enjoyment thereof for the purposes for which the same was constructed, and has ever since been used, without due process of law.

We have looked into the record and find that the questions thus raised are contained therein, and necessarily must be passed upon by this court in arriving at a decision in the case.

By Section 8 of the Act of 1877, creating this court (R. S. Hurd 1903, p. 569), it is provided: "The said Appellate Courts created by this Act shall exercise appellate jurisdiction only, and have jurisdiction of all matters of appeal, or writs of error from the final judgments, orders or decrees of any of the circuit courts, or the Superior Court of Cook County, or county courts, or from the city courts in any suit or proceeding at law, or in chancery other than criminal cases, not misdemeanors, and cases involving a franchise or freehold or the validity of a statute."

It is further provided by Section 89, Chapter 110, entitled, "Practice" (R. S. Hurd, 1903, p. 1412), which section was passed in 1879, that: "Appeals from and writs of error to circuit courts, the Superior Court of Cook County, the Criminal Court of Cook County, county courts and city courts in all criminal cases, below the grade of felony, shall be taken directly to the Appellate Court, and in all criminal cases above the grade of misdemeanors, and cases in which a franchise or freehold or the validity of a statute or construction of the Constitution is involved; * * * shall be taken directly to the Supreme Court."

We have no jurisdiction to entertain an appeal in this case. The statute is imperative. The appeal is dismissed.

Appeal dismissed.

VOL. 120.] Am. Rolling Mill Corporation v. Ohio Iron & Metal Co.

American Rolling Mill Corporation v. The Ohio Iron & Metal Company and S. A. Newman.

Gen. No. 11,954.

1. **BILL OF PARTICULARS**—*when may be demanded.* A bill of particulars may be demanded in all actions where by reason of the generality of the claim or charge the adverse party is unable to know with reasonable certainty what he is required to meet.

2. **BILL OF PARTICULARS**—*effect of, where furnished.* When a bill of particulars has been required and furnished, its effect is to limit the plaintiff on the trial to proof of the particular cause or causes of action therein mentioned.

3. **BILL OF PARTICULARS**—*how propriety of furnishing, determined.* Whether or not the plaintiff shall be ruled to furnish a bill of particulars in a particular case, is a matter resting in the sound legal discretion of the court, and the action of the court in making or refusing the rule will not be reviewed in appellate jurisdictions unless it be shown clearly that such discretion was abused.

4. **BILL OF PARTICULARS**—*appropriately required in action for slander.* Where the allegations of the declaration in an action for slander are not specific enough fully to apprise the defendant of the cause of action in its statement of the actual words uttered, or to whom or in whose presence, or the place where uttered, the court may, and, upon proper application, should order the filing of a bill of particulars so that the defendant may have a fair chance to prepare for the trial.

Action on the case for slander. Appeal from the Circuit Court of Cook County; the Hon. JULIAN W. MACK, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 29, 1905.

Statement by the Court. Appellant brought an action for slander against appellees. The declaration as amended contained ten counts.

March 16, 1904, an order was entered upon appellant to file within twenty days a bill of particulars of places at which, and names of persons to whom, each of said slanderous remarks were uttered, and names of individuals, firms or corporations which otherwise would have dealt with the appellant but for the use of said slanderous words; the filing of said bill to be without prejudice to appellant's right to amend it so as to set up matters coming to the knowl-

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edge of appellant between the date of filing said bill and the trial of said cause, provided the amendment be upon reasonable notice. To the entry of this order appellant duly objected and excepted.

April 8, 1904, said suit was dismissed at appellant's costs and judgment thereon for failure of appellant to comply with the foregoing order. This appeal followed.

CHARLES A. BUTLER, for appellant.

RINGER, WILHARTZ & LOUER, for appellees.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

The several counts of the declaration charge that the alleged defamatory words were spoken "November 25, 1902, in said county, * * * in the presence and hearing of another, or divers persons, * * * and divers persons, who had, previous to the speaking and publishing of said words, been accustomed to deal, and others who would otherwise have dealt with plaintiff in its business, have since then, and wholly on that account, refused to have any dealings with plaintiff," to the damage of plaintiff in the sum of \$100,000.

It is plain that to whom and at what place the alleged slanderous words were used are not set forth in the declaration, nor is any attempt made therein to state the name of any individual, firm or corporation that would have dealt with appellant had such words not been spoken.

A bill of particulars may be demanded in all actions where, by reason of the generality of the claim or charge, the adverse party is unable to know with reasonable certainty what he is required to meet. *C. & N. W. Ry. Co. v. C. & E. Ry. Co.*, 112 Ill. 589, 604; *Stiebeling v. Lockhaus*, 21 Hun, 457. When required and furnished its effect is to limit the plaintiff on the trial to proof of the particular cause or causes therein mentioned. *Morton v. McClure*, 22 Ill. 257; *Waidner v. Pauly*, 141 Ill. 442; *Hess Co. v. Dawson*, 149 Ill. 145. Whether or not the plaintiff shall be

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ruled to furnish a bill of particulars in a given case, is a matter resting in the sound legal discretion of the court, and the action of the court in making or refusing the rule will not be reviewed in appellate jurisdictions unless it be shown clearly that such discretion was abused. *C. & A. Ry. Co. v. Smith*, 10 Ill. App. 359, 362; *DuBois v. People*, 200 Ill. 164.

Where the allegations of the declaration in an action for slander are not specific enough fully to apprise the defendant of the cause of action in its statement of the actual words uttered, or to whom or in whose presence, or the place where uttered, the court may, and, upon proper application, should order the filing of a bill of particulars, so that the defendant may have a fair chance to prepare for the trial.

It is almost necessary, of course, in an action of slander, unless the plaintiff alleges the place where, the time when, and the names of the persons to whom the slander was uttered, to order a bill of particulars of the place where, the time when, and the names of the persons to whom the slander was uttered. *Townsend on L. & S.* (4th ed.), 490.

In *Gardinier v. Knox*, 27 Hun, 500, the date the words were spoken was given, and it was alleged that they were spoken at the Town of Russell "in the presence of divers good and worthy citizens." Upon motion the court ordered a bill of particulars, saying: "The complaint gives little information, for under it proof need not be confined to the day stated; it might be given as to any place in the Town of Russell and as to any persons shown to be present. If the defendant knew the times and place where the occurrence would be shown, he could obtain proof of his own whereabouts."

In *Tilton v. Beecher*, 59 N. Y. 176, an action of *crim. con.*, the trial court denied an application for a bill of particulars solely upon the ground that it had no power to grant it. The Court of Appeals decided that the trial court possessed the power, and for that reason reversed and remanded the case. After an extended review of the authorities in

England and in the United States, the court laid down the following rule: "A bill of particulars is appropriate in all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put for trial with greater particularity than is required by the rules of pleading." See, also, *Com. v. Snelling*, 15 Pick. 321; *Jones v. Platt*, 60 How. Pr. 277; *Davies v. Chapman*, 6 Ad. & E. 767; *Stiebleing v. Lockhaus*, 21 Hun, 457; *Rex v. Hodgson*, 3 Carr & Payne, 422; *N. Y. Infant Asylum v. Roosevelt*, 35 Hun, 501.

The trial court did not err in ordering appellant to file a bill of particulars in this case. Appellant saw fit to disobey that order. Such disobedience fully justified the action of the court in dismissing the suit.

The judgment of the Circuit Court is affirmed.

Affirmed.

Theron L. Hiles v. C. A. Hiles & Company, et al.

Gen. No. 11,972.

1. **BILL OF COMPLAINT**—*when should not be dismissed.* A demurrer admits that the properly pleaded facts of the bill are true, and if from those facts it appears that the plaintiff is entitled to equitable relief, a demurrer should be overruled and the bill should not be dismissed.

2. **STOCKHOLDERS' MEETINGS**—*when regularity of calling of, cannot be questioned.* A stockholder who has appeared at a stockholders' meeting and voted and protested thereat, cannot subsequently question the regularity of the calling of such meeting.

3. **CONSOLIDATION**—*what does not constitute.* Where one corporation sells to another its tangible property, including its good-will, retaining its franchise, its stockholders, and a considerable amount of assets, and receiving the consideration arising as a result of the transaction, a sale and not a consolidation is effected.

4. **PURCHASE AND SALE**—*when within powers of corporation.* One corporation may lawfully purchase of another its entire tangible property.

5. **PURCHASE AND SALE**—*what valid consideration for, made between corporations.* One corporation may purchase of another its entire

tangible assets and give a part of its capital stock in consideration therefor.

6. PURCHASE AND SALE—*when, between corporations, valid, notwithstanding they have common director.* The mere fact that one corporation purchasing from another its entire tangible assets has a common director with such other, does not affect the validity of the transaction, especially where it does not appear that the respective boards of directors of such corporations passed upon the transaction.

Injunctional proceeding. Appeal from the Circuit Court of Cook County; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 29, 1905.

Statement by the Court. The amended bill of appellant upon general demurrer was dismissed by the Circuit Court for want of equity. Thereupon he appealed to this court.

The bill sets up that in 1878 appellant and his father entered into partnership in the business of repairing and selling saws; that in 1882 his brothers were taken into the firm, and the business was enlarged by engaging also in the manufacture of saws; that in 1892 the business was incorporated, with a capital stock of \$20,000, the company having no liabilities except a \$3,000 mortgage on its real estate; that afterwards its capital stock was increased to \$35,000; that of this increase \$5,000 was sold to James A. Patton for cash, and \$10,000 was kept as treasury stock; that in 1903 the accumulated assets of the corporation was more than \$12,265; that the stock was distributed as follows: C. A. Hiles (the father), 44 shares; Henry B. Gates, 49 shares; G. F. Hiles, 41½ shares; Henrietta E. Hiles, 15 shares; James A. Patton, 50 shares; Elmer K. Hiles, 1 share; Thomas S. Hiles, 10 shares; appellant, 39½ shares; and 100 shares remained as treasury stock; that in January, 1903, Thomas S. Hiles commenced to collude with the officers and agents of the American Saw & Knife Works, an Illinois corporation, to consolidate the two corporations; that in furtherance of this purpose Thomas S. Hiles secretly showed the books of the C. A. Hiles & Co. to the officers of the other corporation; that the American Saw &

Knife Works was not prosperous and had been offering to sell its entire business for \$10,000; that the scheme was to consolidate the companies upon a basis of \$17,000 valuation for the assets of the American Saw & Knife Works; that early in 1903 Thomas S. Hiles, for the purpose of furthering said scheme, obtained from C. A. Hiles, the president of the C. A. Hiles & Co., then a resident of California, authority to call a meeting of the stockholders of that company for the purpose of considering such consolidation proposition, contrary to the by-laws, which provided that in the absence of the president the vice-president should be acting president; that C. A. Hiles authorized James A. Patton to represent his stock at said meeting; that about June 1, 1903, said meeting was held, at which the proposition to consolidate was rejected by a vote of all the stockholders of the C. A. Hiles & Co., except the ten shares held by Thomas S. Hiles; that thereafter, and for the purpose of effecting said consolidation, Thomas S. Hiles, without authority, called a meeting, purporting to be the annual meeting of the stockholders of the C. A. Hiles & Co., to be held June 15, 1903, for the purpose of electing a board of directors and of considering a proposition to purchase the property of the American Saw & Knife Works; that before said meeting Thomas S. Hiles transferred one share of the stock of the C. A. Hiles & Co. to each of the directors of the American Saw & Knife Works to enable them to vote at said meeting; that at said meeting Thomas S. Hiles, Stewart M. Gunderson and Fred. S. Nichols procured themselves to be elected as directors of the C. A. Hiles & Co., and Thomas S. Hiles was elected as president and treasurer and said Gunderson as secretary thereof, against the protest and vote of appellant and of said Henry B. Gates; that said meeting was then adjourned to June 18, 1903; that at said adjourned meeting only 116½ shares of the stock of the C. A. Hiles & Co. were represented, being less than the majority of such stock; that appellant was not present at such meeting, but was represented there by counsel, who objected to the same being held; that at such

meeting the alleged proposition to purchase all the assets, business and good-will of the American Saw & Knife Works was consummated; that immediately thereafter the American Saw & Knife Works pretended to convey all its machinery, good-will and assets to the C. A. Hiles & Co., and the latter company assumed all the liabilities of the former company, in accordance with the said pretended scheme of purchase and sale, and a resolution was passed by directors Thomas S. Hiles, Gunderson and Nichols, to pay to George O. Gunderson, president of the American Saw & Knife Works, twenty shares of the stock of the C. A. Hiles & Co. as earnest money and part purchase price, and a resolution was adopted ratifying such purchase and payment; that since said meeting the business of both corporations has been carried on under the name of the C. A. Hiles & Co.; that since said consolidation the business arising and growing out of the interests of the American Saw & Knife Works has involved the C. A. Hiles & Co. in an indebtedness of \$2,000 during the months of July and August, 1903; that the entire business of the consolidated company is insolvent; it has entered into long term leases and has paid debts of the American Saw & Knife Works in the sum of \$5,000, and has paid \$500 in attorney's fees contracted in and about said consolidation, and has paid large salaries, none of which were authorized by the C. A. Hiles & Co., and has borrowed large sums of money, to-wit, \$2,000; that immediately after such consolidation appellant made objection as a stockholder, and made a demand upon the consolidated company to furnish him ample security for his stock, and that he be paid the full value of his stock, and that after such consolidation Thomas S. Hiles, Gunderson and Nichols issued to said George O. Gunderson, president of the American Saw & Knife Works, the entire balance of the treasury stock, namely, \$8,000, in addition to the \$2,000 of such stock theretofore issued to him.

The prayer of the bill is for an injunction; that the election of Stewart M. Gunderson, Thomas S. Hiles and Fred

S. Nichols be set aside; that the consolidation alleged to be a purchase be set aside; that the issue of said treasury stock be canceled, and that all moneys paid for counsel fees be refunded, and for general relief.

It also appears by the bill that at and before the meeting of June 15, 1903, the directors of the C. A. Hiles & Co. were C. A. Hiles, Theron L. Hiles, Elmer K. Hiles, Thomas S. Hiles and Henry B. Gates; and that the officers thereof were C. A. Hiles, president; Theron L. Hiles, vice-president, and Elmer K. Hiles, secretary. That at said meeting the following directors were elected: Stewart M. Gunderson, Fred S. Nichols, Theron L. Hiles, Thomas S. Hiles and Henry B. Gates, and Thomas S. Hiles was elected president and Stewart M. Gunderson as secretary.

The proposition for the proposed consolidation of the two corporations, which appellant alleges was rejected by the stockholders of the Hiles Co., is attached to the bill as an exhibit. It sets out in an alluring manner and very much in detail the saving that would be made in the production and in the sale of saws and knives by a combination of the two plants into one company and under one management.

After the rejection of the consolidation proposition, as is shown by the bill, the American Saw & Knife Works offered to sell its assets to the Hiles Co. This offer, except the address and signature, is as follows:

“GENTLEMEN: We hereby propose to sell to you our machinery, tools, implements, etc., of every description, good-will and book accounts and bills and notes receivable and entire business, subject to payment by you of bills, accounts and notes payable for merchandise, material, etc., for a consideration to be arrived at by an inventory and appraisement to be made of all our tangible property on a fair and equitable basis.

We would suggest the appraisement be made by one party selected by us, and one party to be selected by you, and if they cannot agree, a third party to be agreed upon by the appraisers, to be umpire, and his decision to be irrevocable.

The settlement for the above is to be made at your option

either in cash or by \$10,000 of treasury stock of your company, fully paid, and the balance of excess above \$10,000 to be paid by notes of your company due on or before one year, with the in the event of your increasing the capital stock of your company or taking up any of said notes by said stock at par as shall be fully paid.

It being thoroughly understood and agreed that the accounts and bills receivable of both companies are to be guaranteed, and that the bills and accounts payable of your company shall not exceed the bills and accounts receivable in any event more than \$1,500."

P. R. BARNES, for appellant; JOHN N. SWARTS, of counsel.

BROWNING & SHEPARD, for appellees.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

The demurrer admits that the properly pleaded facts of the bill are true; and if, from those facts, it appears that appellant is entitled to equitable relief, the demurrer should have been overruled, and the bill should not have been dismissed. *Women's Catholic Order v. Haley*, 86 Ill. App. 330; *Langlois v. McCullom*, 181 Ill. 195.

It is admitted by counsel for appellees that, if the acceptance of the proposition of a sale was a consolidation, and not a purchase and sale, then the statute was not complied with, and, therefore, unless there was a ratification by the Hiles Company or laches upon the part of appellant, the bill was not demurrable.

It does not require the citation of authorities to establish the proposition that after appellant had appeared at the meeting of the stockholders of the Hiles Company and had voted and protested as a stockholder and as a director against the action of the majority of the stockholders and directors there assembled, he will not be heard to say that such meeting was irregularly called.

The meeting of June 15, 1903, was adjourned until the 18th day of the same month. It is alleged that at such adjourned meeting a majority of the stock of the Hiles Com-

pany was not represented. An adjourned meeting of a regular meeting may transact lawful business without reference to the number of those who attend.

It is true that many times in the bill the transaction complained of is called a consolidation. But calling it a consolidation does not make it so. Its character must be determined by the facts appearing upon the face of the bill. Appellant alleges that at the June 1, 1903, meeting, the proposition for a consolidation of the two corporations was rejected. Following that rejection, and at the meeting of June 18, 1903, the American Saw & Knife Works made to the Hiles Company a proposition, which appellant alleges was a proposition "to sell the machinery, tools, implements, good-will and the entire business of the American Saw & Knife Works to the said C. A. Hiles & Company." It will be noted that this proposition does not include the sale of the stock of the American Saw & Knife Works, nor does it purport to be a consolidation proposition. It is manifest that if carried out, the latter company is stripped of its tangible property, but it would still have on hand the consideration received as an equivalent for its property and business.

In the case of C., S. F. & C. Ry. Co. v. Ashling, 160 Ill. 373, cited by appellant, the main contention was whether or not the St. Louis Railway Company had been consolidated with the Santa Fe Company. In considering this question the court say: "The resolutions and deed of conveyance provided that in addition to the consideration of one dollar to be paid by the Santa Fe Company and the assumption and payment of the bonded indebtedness of the St. Louis Company, the Santa Fe Company should issue its stock to the stockholders of the St. Louis Company, dollar for dollar, in exchange for their stock in the latter company. The effect of this part of the transaction was to incorporate in the Santa Fe Company the stockholders of the St. Louis Company, combining all the stockholders of each company in one. This was an act of consolidation, and not by any means necessary to a mere purchase and sale. If

the transaction could be distinguished from a consolidation as a mere purchase and sale, to be regarded as a fair one (and it should be so regarded for the purpose of this argument), the St. Louis Company itself, and not its individual stockholders, should have received all the consideration for the property conveyed, so that it would have the equivalent of the property sold with which to meet the obligations and liabilities which it had created or incurred. * * * By the transaction the St. Louis Company was left without property, corporate rights or franchises of any kind, and without stockholders. All of these were transferred bodily to the Santa Fe Company, and became united, respectively, with the property rights, franchises and stockholders of the latter company. Why was this not a consolidation of the St. Louis Company with the Santa Fe Company? There is no magic in words. Merely calling the transaction a purchase and sale would not prevent it from being a consolidation. It cannot be supposed, from the nature of this transaction, that it was expected that the St. Louis Company should continue its active corporate existence after divesting itself of all its property, corporate rights and franchises and stockholders."

In the case at bar the sale was of the tangible assets, notes and accounts receivable, and the good-will of the American Saw & Knife Works. After this contract was executed there remained with and in the latter company its franchise, its stockholders and assets to the par value of \$10,000 of the stock of the purchasing company. It continued to exist as a corporation, and could not be dissolved, had its stockholders so desired, until such assets had been legally distributed. *Gulf, C. & St. F. Ry. Co. v. Newell*, 73 Tex. 334. Further, the consolidation for the purchase, as in the bill alleged, went to the selling company, and not to its stockholders. Tested by the rule indicated in the *Ashling* case, *supra*, this transaction was a sale and not a consolidation.

If it was a purchase, and made in good faith, it must stand. Looking at the offer as made and accepted, it ap-

pears that no price was fixed. The value of the tangible property was to be ascertained by an appraisement, which was to be made by the buyer and seller, with a proviso that if they could not agree they might call in a third person, whose decision in that regard should be final. In this appraisement there was nothing to be allowed for intangible property. That appraisement price could be paid either in cash or in the stock of the Hiles Company at its par value. And it was further agreed that the bills and accounts payable of the selling company should not exceed its guaranteed bills and accounts receivable by more than \$1,500. We find nothing in this offer nor in its acceptance by the Hiles Company, which is unfair to that company, or by which appellant was legally damaged.

Nor is it controlling that the purchase as made embraced the entire assets of the selling company. The statute (R. S. Hurd, 1903, sec. 5, ch. 32, p. 472) contains no prohibition forbidding a corporation from purchasing goods in the line of its business, either at wholesale or at retail. In the absence of such limitation the Hiles Company had the right to enter into this contract. *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 404.

The fact that the consideration price of this contract was paid in the stock of the Hiles Company is immaterial. A corporation may receive any property it may lawfully purchase in exchange for its stock. 1 Cook on Corpn's., secs. 18 and 22; 26 Am. & Eng. Ency., §40, 2nd ed.

Appellant contends that this contract is illegal and void, because at the time it was entered into, the two corporations had a director in common. We do not so understand the law. Where, as we have found in this case, the contract was a fair one, the court will sustain it, even though one of the directors was common to both corporations. 2 Cook on Corporations, secs. 658, 662. But if this were not the law, the bill does not allege that the directors of the Hiles Company passed upon the acceptance of this contract. In the absence of such an allegation the question here attempted to be raised is not before us.

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The fact, as the bill alleges, that this purchase turned out to be a losing one for the Hiles Company, and caused a loss to appellant and to the other stockholders of that corporation, is immaterial in this controversy. While it may impeach the wisdom of the purchase, it does not touch the power to enter into it.

Believing that the bill of complaint sets up no equitable ground for relief, we affirm the decree of the Circuit Court.

Affirmed.

**Arthur J. Eddy, et al., Trustees, etc., v. People, ex rel.
Maria Welter.**

Gen. No. 11,934.

1. **RECORD**—*presumption that trustees of police and firemen's relief fund, keep.* It is presumed that such trustees keep a record of their proceedings.

2. **PENSION**—*when discontinuance of, illegal.* Where a pension has been legally awarded to the widow of a patrolman, the trustees of the fund from which it is paid cannot, after the lapse of many years and in the absence of the person pensioned, review the evidence heard by a former board, determine that such former board reached an erroneous conclusion from such evidence, set aside its decision and strike the pensioner's name from the pension list.

3. **PENSION AWARD**—*evidence upon which, predicated, need not be preserved.* The statute does not require that the evidence on application for a pension shall be preserved in any way, and a pension award duly entered by the proper authority is valid.

Mandamus proceeding. Appeal from the Circuit Court of Cook County; the Hon. EDWARD O. BROWN, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed May 29, 1905.

Statement by the Court. This is an appeal from a judgment granting a peremptory writ of *mandamus* against appellants.

The petition, filed January 7, 1904, is in substance as follows: Petitioner represents that she is a resident of the city of Chicago, and the widow of Dominick Welter, deceased; that on or about the 22nd day of November, 1882,

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said Dominick Welter became a member of the police department of the city of Chicago, and so remained up to the 8th day of July, 1885, on which day he died; that Dominick Welter, while a member of said police department, held the position of secretary or inspector of the police department and acted as drill master in said department; that, while engaged in the actual discharge of the duties of his position on the 25th day of June, 1884, he was stricken down and became physically ill because of physical efforts exerted by him, and which were necessary to be exerted in carrying out and performing his duties, and that as a result of said physical ailments and disability so caused, the said Dominick Welter died; that at the time said Dominick Welter became a member of the police department there had been established in the city of Chicago a police and firemen's relief fund, entitled "An Act to amend an Act for the relief of disabled members of the Police and Fire Departments of cities and villages," approved May 24, 1877, in force July 1, 1877; approved May 10, 1879, in force July 1, 1879; which police and firemen's relief fund continued to be maintained until amended by the act of 1887, as hereinafter set forth; that said Dominick Welter became a member of said police and firemen's relief fund at the time he joined the police department, and continued as a member in good standing until the date of his death; that after the death of said Dominick Welter, relator, as his widow, made application to the trustees of said police and firemen's relief fund for the payment to her as such widow, so long as she should remain unmarried, of a sum of money not exceeding \$600 per annum, in accordance with the provisions of said act, and submitted to said trustees proofs of the death of said Dominick Welter, and that his death was the immediate effect of an injury received by him while in the discharge of his duties as such member of the police department, and such proceedings were thereupon had by such trustees that they found said application regular in accordance with law, and that said Dominick Welter's death was the immediate effect of an injury received by him while

in the actual discharge of his duties as such officer and member of the police department, and awarded relator an annual pension of \$360 per annum as long as she should remain unmarried; that said trustees thereupon proceeded to make payment to relator, commencing October 1, 1885, of said sum of \$360, and continued such payments until the formation of the board of police pension fund commissioners under and by virtue of an act entitled "An Act to provide for the setting apart, formation and disbursement of the Police Fund in cities, villages and incorporated towns," approved April 29, 1887, in force July 1, 1887; that in accordance with the provisions of last mentioned act, the city of Chicago, on the 1st day of July, 1887, having a population of more than 50,000 inhabitants, arranged for the formation and disbursement of a police pension fund, in accordance with the provisions of said last mentioned act, and there was then and there established a board of police pension fund commissioners in accordance with the provisions of said act, who then and there proceeded to comply with and carry out the provisions of said act, and that in accordance with the provisions of section 12 of said act, the relator then and there became entitled to receive the benefits provided for in said act; that at the time of the death of Dominick Welter the salary attached to his rank in the police department was \$3,000 per annum, and in September, 1887, in accordance with the provisions of section 6 of said last mentioned act, the board of police pension fund commissioners directed that a yearly pension of \$1,500 should be paid to relator as such widow, and that from that time until about the 17th day of October, 1903, relator was regularly paid said pension of \$1,500 per annum, in monthly installments of \$125 each; that on May 16, 1903, there went into effect an act entitled "An Act to amend Sections 1, 2, 3, 4, 6, 9, 10 and 11 of an Act entitled 'An Act to provide for the setting apart, formation and disbursement of a Police Pension Fund in cities, villages and incorporated towns,'" approved April 29, 1887, in force July 1, 1887, as amended by an act approved April 24, 1899, in force July 1, 1899, as

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amended by an act approved May 11, 1901, in force July 1, 1901; and that in accordance with the provisions of said act there were duly appointed by the mayor of the city of Chicago three persons as constituting the board of trustees of the police pension fund of the city of Chicago, such persons being A. J. Eddy, B. E. Sunny and Thomas Boyle, and that the other two members of said board provided for by said act had not yet been appointed; that said Eddy, Sunny and Boyle duly qualified as members of said board of trustees; that on or about October 17, 1903, said board of trustees passed a resolution by which they refused any longer to pay the said relator the pension which had been awarded her, as hereinbefore set forth; and ever since have refused and still refuse to pay to said relator said pension, or any part thereof, although under the provisions of said act of 1903, said relator is entitled to be paid a yearly pension of \$900; that on or about the 18th day of October, 1903, relator received from the clerk of said board of trustees a letter in words and figures as follows, to wit:

“In accordance with a resolution by the Pension Board, I am instructed to notify you that further payment of pension will be withheld for lack of evidence that death was caused by injury received while in performance of duty, as required by law. Please prepare your papers and evidence and present them at this office at as early a date as possible, thereby avoiding any unnecessary delays.”

That relator thereupon protested to said board that they had no right or authority to call upon said relator for additional proof of the cause of death of Dominick Welter, and had no right or authority to strike her name from the roll of beneficiaries of said pension fund, and to refuse to pay her the pension to which she was entitled under the provisions of said act of 1903; that on the 8th day of December, 1903, she delivered to said board of trustees the following protest:

“I acknowledge the receipt of a letter from Mr. C. F. White, clerk of your board, dated October 17, 1903, stating that a resolution has been duly passed by your board that the further payment of the pension heretofore paid to me

as the widow of Dominick Welter, deceased, will be withheld for lack of evidence that the death of Dominick Welter was caused by injury received while in the performance of duty as required by law, and requesting me to furnish and present to your Honorable Board further evidence of my right to receive such pension.

Replying thereto, I beg to call your attention to the fact that I am a beneficiary of the Pension Fund under the act of 1879, and that under the law your Honorable Board has no right or power to strike my name from the roll of beneficiaries of the Pension Fund under your charge and control; and likewise has no right or power to set aside the finding and judgment of the previous Board of Trustees of said fund, to whom proofs of my right to be designated as beneficiary of said fund were properly submitted, and by them found to be sufficient, and who ordered my name to be placed upon the roll of beneficiaries of said fund. I, therefore, respectfully protest against the action of this Honorable Board in the premises, and request that you replace my name upon the roll of beneficiaries entitled to payment from said Pension Fund, and that you do pay to me without delay, and order to be paid to me, according to the rules of this Honorable Board, all sums of money which have accrued, and would have been paid to me at the date hereof, had it not been for the action of this Honorable Board in refusing, as hereinbefore set forth, to do so."

That said board of trustees thereupon refused to rescind its previous action and refused to consider said relator as entitled to any of the benefits of said fund, or to order the payment to her of any sum whatsoever as a beneficiary of said fund, and still so refuses; that under and by virtue of the provisions of section 12 of the act of 1887, which section is still in force and effect, unchanged and unmodified by the act of 1903, said board of trustees is in duty bound to recognize the rights of relator as coming within the special class of persons receiving benefits under the act of 1887, and, therefore, entitled to the benefits of the act of 1903, and that said board has no right or authority to pass upon the validity of the pension of relator; that relator has no remedy in the premises except by order of this court, etc. Prayer for writ.

Appellants demurred generally to the petition, the court

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overruled the demurrer, and appellants electing to abide by their demurrer, the court rendered judgment, awarding the writ of *mandamus* as prayed.

JOHN W. BECKWITH, Assistant Corporation Counsel, for appellants; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

CHARLES L. DALY and EDMUND S. CUMMINGS, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

The sole question is whether the petition is sufficient, on its face, to sustain the judgment. It is not claimed that there was any irregularity in the proceedings of the board of trustees, on the application of the petitioner for a pension, or that the same was not granted in strict conformity with the law.

It is averred in the first part of the petition that Dominick Welter, while a member of the police department, held the position of secretary, or inspector, and drill master of the department, and while engaged in the actual discharge of the duties of his position, June 25, 1884, he was stricken down and became physically ill, because of physical efforts necessarily exerted by him in the performance of his duties, and that, as a result of ailments and disability so caused, he died.

It is further averred that, after the death of Dominick Welter, petitioner applied to the trustees of the police and firemen's relief fund for the payment to her of a pension of not exceeding \$600 per annum, so long as she should remain unmarried, and that she submitted to said trustees proof that the death of said Dominick was the immediate effect of an injury received by him while in the discharge of his duty as a member of the police department; and that the trustees found the application to be true and awarded petitioner an annual pension of \$360, so long as she should remain unmarried.

It is further averred that, subsequently, under the acts of the legislature mentioned in the petition, petitioner's pen-

sion was continued and increased, and was paid down to October, 1903.

These averments are material, are admitted by the demurrer, and must, therefore, be assumed to be true, and they show clearly, as we think, that the petitioner is entitled to a pension. Is the effect of these averments avoided or nullified by the notice from the clerk of the board of trustees set out in the petition? The notice is dated October 18, 1903, and is as follows:

"In accordance with a resolution by the pension board I am instructed to notify you that further payment will be withheld for lack of evidence that death was caused by injury received while in the performance of his duties as required by law. Please prepare your papers and evidence and present them at this office at once, thus avoiding any unnecessary delay.

C. F. WHITE, Clerk."

This certainly appears to be rather a summary proceeding in the case of one solemnly adjudged, after a full hearing, to be entitled to a pension in 1885, or about twenty years ago, and whose pension was continued, without objection on the part of the trustees, for some eighteen years. The notice does not set forth any resolution of the board, or any copy of any record of the board; nor does it even state any investigation by the board, or wherein evidence furnished eighteen years before the date of the notice was found unsatisfactory. It does not appear that there is any record of any action of the board in the premises. For aught appearing the notice was the mere unauthorized act of the clerk. We do not think that in passing on the demurrer, the notice is entitled to any consideration.

It must be presumed that the trustees kept a record of their proceedings on the relator's application for a pension, as by section 3 of the act of 1877 (Hurd's Rev. Stat. 1903, p. 362) they were required to do, and that the record shows a finding and adjudication in her favor. The board, in passing on an application for a pension, acts in a *quasi* judicial capacity, and its decision is *quasi* judicial, and we cannot concur in the contention to which counsel for appel-

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lants is apparently forced by the necessity of the case, that the decision of the board is of so little weight that it can, after a lapse of many years, and in the absence of the person pensioned, review the evidence heard by a former board, determine that such former board reached an erroneous conclusion from the evidence, set aside that board's decision and strike the pensioner's name from the pension list. The statute does not require that the evidence, on application for a pension, shall be preserved in any way, and it is doubtful, to say the least, whether the evidence on the petitioner's application has been preserved. The petitioner was pensioned in 1885, and section 12 of the act of 1887 provides as follows:

"All members of the police force, and any widow or child or children of such members of any such city, village or town, who, upon the taking effect of this act, shall be entitled to receive any benefit under an act entitled 'An Act to amend an act for the relief of disabled members of the police and fire departments in cities and villages,' approved May 24, 1877, in force July 1, 1877, as amended by an act approved May 10, 1879, in force July 1, 1879, shall receive no payments or benefits under said act, but shall, in lieu thereof, be entitled to the benefits provided for in this act. But if at any time there shall not be sufficient moneys belonging to such fund to pay the allowances of such board to its beneficiaries, then they shall be paid *pro rata* from such fund, but no allowance or order of such board shall be held to create any liability against any such city, village or town, except upon the fund so set apart as aforesaid for the payment thereof." Hurd's Rev. Stat. 1903, p. 368.

We are of opinion that the demurrer was properly overruled, and the judgment will be affirmed.

Affirmed.

Mr. Justice BROWN took no part in the decision of this case.

George E. Krieger v. Emily Bert Krieger.

Gen. No. 11,907.

1. **FINDING OF CHANCELLOR**—*when not conclusive.* The finding of a chancellor based solely upon an affidavit is not conclusive, and the Appellate Court will refer to such affidavit to determine for itself whether such finding is correct.

2. **DECREE**—*within what time, may be set aside.* A court entering a decree has control thereof during the term at which it is entered and may, on good cause shown, amend or set it aside during such term.

3. **DECREE**—*how cannot be impeached for fraud.* A consent decree cannot be impeached for fraud by a mere motion. An original bill in the nature of a bill of review is essential for that purpose.

4. **DECREE**—*when cannot be impeached for fraud.* A decree cannot be impeached for fraud where it was entered by consent and such consent was induced by promises which were not kept and which may not at the time have been intended to be kept. There must appear to have been a false representation of a material fact.

5. **NOTICE**—*when party deemed to have.* Notice to the solicitor of a party over whom the court has acquired jurisdiction, is notice to him, and this is true notwithstanding a final decree has been entered in the cause. The right so to serve a party continues until the court has lost control over such decree.

Divorce proceeding. Error to the Circuit Court of Cook County; the Hon. EDWARD O. BROWN, Judge, presiding. Heard in this court at the October term, 1904. Reversed. Opinion filed May 29, 1905.

Statement by the Court. March 26, 1903, the defendant in error, who will hereafter be referred to as complainant, filed in the Circuit Court against plaintiff in error, hereinafter referred to as defendant, a bill for divorce, alleging, as ground for divorce, adultery with one Rose Adams and others not named in the bill. The bill prayed, among other things, for a temporary injunction restraining the defendant from alienating or disposing of property described in the bill, and for the custody of Eddy Bert Krieger, a minor child of the parties, and the court granted a temporary injunction as prayed. George E. Krieger, the defendant, answered denying the material allegations of the bill. His answer is signed by himself and is also signed, "James Lane Allen, George N. Morgan & Bro., solicitors and of counsel." A replication was filed.

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June 26, 1903, the following order was entered in the cause: "On motion of complainant's solicitor, it is ordered that this cause be and the same is hereby dismissed out of this court, without costs." July 14, 1903, the following entry was made in the cause: "This day came the complainant, by her solicitor, and moves the court to vacate and set aside the order of dismissal heretofore entered, which motion was continued." July 18, 1903, complainant's solicitor, Mr. Charles C. Gilbert, appeared in court, read a notice to Mr. James Lane Allen, that on Saturday, July 18, 1903, at ten o'clock A. M., he, Gilbert, would appear before Judge Gibbons, one of the judges of the Circuit Court, and move the court to vacate and set aside the order dismissing the bill of complaint, and would read in support of said motion an affidavit accompanying the notice. Attached to the notice is an affidavit of Gilbert to the effect that he served the notice by leaving with James Lane Allen, personally, copies of the notice, motion and affidavit July 17, 1903. The affidavit mentioned in the notice in support of the motion, and which was read in support thereof, is quite lengthy. It is in substance as follows: After deposing that the affiant is solicitor for the complainant, and stating that the defendant was restrained, by the temporary injunction, from interfering with the complainant's custody and control of her son, Eddy Bert Krieger; that thereafter the injunction was modified by the court, permitting the defendant to have the custody of the child for certain hours during daylight, on each and every Sunday, until further order; that about June 8, 1903, affiant came to the conclusion that the charges of adultery in the bill could not be sustained by any evidence then within the knowledge of affiant or of the complainant, "on account of a certain witness, upon whom affiant had relied to sustain said charges of adultery, repudiating the allegations or statements made by said witness before said bill was filed;" that affiant notified James Lane Allen, defendant's solicitor, of his said conclusion, and negotiations were opened for an amicable settlement; that defendant, by his said solicitor,

proposed to affiant that the bill should be dismissed, and thereafter, that defendant should be permitted to have the custody of his son, Eddy Bert Krieger, during vacation time, for two or three days at a time; that said proposition was submitted to complainant by affiant, and she rejected it, of which defendant's solicitor was notified by affiant. The affidavit continues as follows:

"The complainant would not agree to the proposition, because the said child is of tender years and had never been absent from her care over night. These negotiations were continued and carried on until the 26th day of June, 1903, when the said parties, through their respective solicitors, agreed, among other things, that the said bill should be dismissed, and that the said respondent should have the custody of said child thereafter upon one day in each week, and until a court of competent jurisdiction should at some future time fix the status of said child respecting its said parents; but it was distinctly understood and agreed that under no circumstances was said child to be kept away from the complainant after dark.

Affiant further states that the said complainant then and there, relying upon said agreement made as aforesaid and upon the good faith of said respondent, directed this affiant, as her solicitor, to dismiss said bill of complaint, which was accordingly done on the 26th day of June, 1903. And thereafter the said respondent, George E. Krieger, called at complainant's residence for the said child one or more times, upon which occasion or occasions, the complainant acting in good faith and believing in the good faith of respondent, placed the said child in respondent's custody for the purpose of carrying out her part of said agreement. Upon these occasions the said respondent promptly returned the said child to complainant's custody strictly in accordance with said agreement.

But thereafter, on Wednesday afternoon, the 8th day of July, 1903, the said respondent called for said child as he had previously done, and complainant, believing in the good faith of the said respondent, and that he would strictly adhere to his said agreement, permitted her son to leave her residence, believing that the said respondent would return her son to her, as he had habitually done theretofore; but affiant states that the said respondent has not returned said child to the complainant, and upon information and belief, affiant states the said respondent does not intend to return

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said child, but on the contrary proposes to retain the custody of said child in defiance of said agreement, and for the purpose of annoying and seriously disturbing the peace and quiet of complainant, and to prevent complainant from having the benefit of any lawful rights that she may have respecting the custody of said child.

This affiant further states that on the 8th day of July, the following letter was received by the complainant:

'7-8, '03.

MRS. E. KRIEGER, City:

Have tried in vain to reach you by 'phone to say that we are going on an excursion to Cedar Lake for a day or two. Shall take good care of Eddy and let you know to-morrow at what time he will be back.

Yours, (Signed) DR. KRIEGER.'

and thereafter the following postal cards were received by the complainant, the originals of which in the handwriting of the said respondent, George E. Krieger, are ready to be produced:

'CEDAR LAKE, 7-9, '03.

MRS. E. KRIEGER, Chicago:

Eddy wants me to say that he has a very good time and would like to stay another day. Will be home Saturday afternoon.

Sincerely, (Signed) G. KRIEGER.'

'MRS. E. KRIEGER:

Have decided to extend my trip with Eddy another week or so, and shall mail details next week. Eddy is well and sends his love. Yours, etc.,

(Signed) DR. G. E. KRIEGER,'

which postal card was received by the complainant July 12, 1903.

And affiant further states, upon information and belief, that said letter and postal cards were caused to be mailed to the complainant by the said respondent by some one or more persons unknown to this affiant or to the complainant, and the said letter and postal cards were mailed to quiet any suspicion which might be aroused in the complainant's mind by the unexpected absence of her son.

Affiant also states that on Saturday, the 11th day of July, 1903, upon information and belief, the said respondent caused some person unknown to this affiant or to complainant, to telephone from some point in the city of Chicago to the complainant a message in substance that the said respondent would not return the said Eddy Bert Krieger to the complainant Saturday night, July 11, 1903.

Affiant further states upon information and belief that the said respondent has taken the said child, Eddy Bert Krieger, and fled the jurisdiction of this county, and on Wednesday evening July 8, so affiant is informed, the said respondent took passage with the said child over the Erie Railroad for New York city, and that he took with him at said time three pieces of baggage, which were checked to New York city, and paid while on the train half fare for the transportation of said child to New York city.

Affiant further states that he has been unable to locate said respondent's precise destination, but believes from such information as he has, that said respondent has gone to Neumünster, Holstein, Germany, for the purpose of hiding and secreting said child, and for the purpose of placing him beyond the jurisdiction of this court and beyond the control and custody of the complainant, and for the purpose of carrying out and consummating the scheme of fraud and deception which affiant states the said defendant had conceived and determined to perpetrate before said agreement was made, upon the court, his own solicitor, the solicitor for the complainant and the complainant.

Affiant further states that since said bill of complaint was dismissed and since the flight of said respondent, he has been furnished with new and additional evidence and which was unknown to the complainant or this affiant at the time said bill of complaint was dismissed, and affiant further states that he is of the opinion that said new and additional evidence strongly tends to sustain the charges of adultery in said bill of complaint, and that it is of such a character as would entitle the complainant to the relief for which she has asked in said bill of complaint, as well as the absolute custody and control of said child.

Affiant further states that he believes that Mr. James Lane Allen, the solicitor for the said respondent, acted in absolutely good faith with this affiant in the making of said agreement, and that the said Allen was in no way consulted or in any manner concerned in the flight of the said respondent, nor in the fraud thus perpetrated upon the complainant."

The court, July 18, 1903, allowed said motion, and acting solely on Mr. Gilbert's affidavit, set aside the order dismissing the cause. The order concludes as follows:

"It is further ordered that the clerk of this court re-docket said cause.

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And this cause coming on further to be heard on the motion of the solicitor for complainant, for an order upon said defendant to return said child, Eddy Bert Krieger, to the jurisdiction of this court and to the control and custody thereof, and the court being fully advised in the premises, doth find that the said child, Eddy Bert Krieger, has been since the filing of said bill of complaint and is now a ward of this court and ought to be within the control and custody of this court.

It is therefore ordered, considered, adjudged and decreed by the court, that the said defendant, George E. Krieger, forthwith return said child, Eddy Bert Krieger, to the jurisdiction and to the custody and control of this court, there to stand and abide such other and further order in the premises as to justice and equity shall pertain."

May 4, 1904, the court rendered a final decree, dissolving the marriage relation between the complainant and the defendant, adjudging that the complainant have the custody of her son, Eddy Bert Krieger, and be allowed to resume her maiden name, and for alimony and solicitor's fees. Subsequently motions were made on behalf of defendant, Krieger, to set aside the final decree and all orders subsequent to June 26, 1903, when the bill was dismissed.

RUBENS, FISCHER, MOSSER & RIGBY, for plaintiff in error.

CHARLES C. GILBERT, for defendant in error.

MR. JUSTICE ADAMS delivered the opinion of the court.

The contention of counsel for plaintiff in error is, that the order of July 18, 1903, vacating the decree of June 26, 1903, and reinstating the cause, is void for want of jurisdiction, and that all orders subsequent to June 26, 1903, when the bill was dismissed, on motion of complainant's solicitor, including the final decree of divorce, are void for want of jurisdiction.

The court, in the order of July 18, 1903, finds that it has jurisdiction of the parties and the subject-matter, and also finds that the defendant, Krieger, perpetrated a fraud on the court and on his own solicitor, Mr. James Lane Allen. But it appearing from the record that the order reinstating

the cause is based solely on the affidavit of Mr. Charles C. Gilbert, the finding that the defendant perpetrated a fraud on the court, is not conclusive, and the affidavit may be referred to in determining that question. It is stated in Mr. Gilbert's affidavit that "the said parties, through their respective solicitors, agreed, among other things, that the said bill should be dismissed, and that the said respondent should have the custody of said child thereafter upon one day in each week, and until a court of competent jurisdiction should, at some future time, fix the status of said child, respecting its said parents; but it was distinctly understood and agreed that under no circumstances was said child to be kept away from complainant after dark. Affiant further states that the said complainant, then and there, relying upon said agreement, made as aforesaid, and upon the good faith of said respondent, directed this affiant, as her solicitor, to dismiss said bill of complaint, which was accordingly done on the 26th day of June, 1903." The bill was dismissed by complainant's solicitor, as was agreed between the parties; no artifices were resorted to for the purpose of deceiving or misleading the court. The affidavit does not support the finding that the defendant perpetrated a fraud on the court, and we cannot concur in that finding. June 26, 1903, when the bill was dismissed, and July 18, 1903, when the cause was reinstated, were both days of the June term, 1903. The court has control of a judgment or decree during the term at which it is rendered, and may, on good cause shown, amend or set it aside during such term. *Stahl v. Webster*, 11 Ill., 511; *Smith v. Vanderburg*, 46 Ill. 34; *Edwards v. Irons*, 73 Ill. 583; *Shannahan v. Stevens*, 139 Ill. 428.

In *Smith v. Vanderburg* the court say: "During the term the record of every cause is in the breast of the court, and such amendments may be made by the court, on its own motion, after inspection thereof, as justice and the right of the case may seem to require."

In *Edwards v. Irons*, the court say: "There is no rule of practice better settled or more uniformly recognized than

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that the record of a judgment is under the control of the court during the term at which it is rendered." This statement of the law necessarily involves that the court, during the term at which a judgment or decree is rendered, retains jurisdiction of the parties and the subject-matter of the litigation; which being so, the court had jurisdiction of the defendant, Krieger, when the order of July 18, 1903, vacating the order of June 26, 1903, and reinstating the cause, was rendered. And if the court had jurisdiction of the defendant, the notice served by complainant's solicitor on Mr. James Lane Allen, defendant's solicitor, was notice to the defendant. Mr. Allen was retained as defendant's solicitor in the cause, and was, when the notice was served upon him, defendant's solicitor of record, and he and the defendant were bound to take notice of the law, that the decree of June 26th, was in the breast of the court during the term.

It is manifest that, to hold that an attorney or solicitor is not authorized to appear for his client after the rendition of a judgment or decree, and during the term at which it is rendered, and while, in contemplation of law, it remains in the breast of the court, would not only be extremely inconvenient to the court and suitors, but, if a party should remove beyond the jurisdiction of the court, as the defendant is alleged to have done in the present case, might result in injustice. In *U. S. v. Curry*, 6 How. marg. p. 110, a decree was rendered by the United States District Court for the Louisiana district, an appeal was taken to the Supreme Court of the United States, and a citation was issued to the appellees, requiring them to appear in the latter court at a time specified in the citation, and was served by the marshal on the attorney for the appellees in the District Court. An affidavit of the attorney was filed in the Supreme Court, stating that at the time of service on him he was not attorney for the appellees, that his fee had been paid, and that he had been discharged as appellees' attorney, and that he so informed the marshal at the time of service on him. In respect to the service, the court say: "No at-

torney or solicitor can withdraw his name, after he has once entered it upon the record, without leave of court; and while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself; and we presume that no court would permit an attorney who had appeared at the trial, with the sanction of the party, expressed or implied, to withdraw his name after the case is finally decided. For, if that could be done, it would be impossible to serve the citation where the party resided in a distant country or whose place of residence was unknown, and would in every case occasion unnecessary expense and difficulty, unless he lived at the place where the court was held, and so far from permitting an attorney to embarrass and impede the administration of justice by withdrawing his name after trial and final decree, we think the court should regard any attempt to do so as open to just rebuke."

In *Tripp v. Santa Rosa St. R. R. Co.*, 144 U. S. 126, which was error to reverse a judgment of the Superior Court of California, notice of the citation was served on the attorney of record of the defendant in error by mail, and the court, citing with approval *United States v. Curry*, held the notice sufficient.

Similar service was held sufficient in *Miller v. Miller*, 37 How. Pr. R. 1, and *Doane v. Glenn*, 1 Colorado, 454. See, also, *Lusk v. Hastings*, 1 Hill, 656, 662.

Appellant's counsel say of the cases cited that "they are simply contrary to the rule of this State laid down in *Swift v. Allen*," which case is mainly relied on by counsel for defendant in support of the contention that the service on defendant's solicitor of notice of the motion to vacate the order of June 26, 1903, was a nullity. In that case the complainant in a bill in equity, which was dismissed, gave notice, after the expiration of the term at which the decree was rendered, to the former solicitor of the defendant of a motion for a material amendment of the decree, and the court granted the motion. Held, that the notice to the

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former solicitor for the defendant was of no avail, "because his connection with the suit had terminated with the final decree," and that the order amending the decree was a nullity. The court, in the opinion, say: "At a subsequent term this decree was amended on motion." In the present case, the motion was made and notice served at the term at which the decree dismissing the bill was rendered. Our conclusion is that the court had jurisdiction to hear and determine the motion. Whether the court erred in granting the motion is another question. Counsel for defendant contend that the court erred in sustaining the motion, for two reasons: first, because the decree was by consent, and therefore, could not be vacated or set aside on motion, but only by original bill; and second, that the defendant's alleged breach of his agreement was not, in legal contemplation, such fraud as warranted the vacation of the dismissal decree. It is not expressed in the decree dismissing the bill that it was dismissed by consent, but it appears by the affidavit of Mr. Gilbert, complainant's solicitor, that the bill was, in fact, dismissed by agreement between the parties, and the court, in the order vacating the decree dismissing the bill and reinstating the cause, finds "that the parties hereto entered into the agreement as set forth in the affidavit." In *Armstrong v. Cooper*, 11 Ill. 540, the defendant in error pleaded specially that the decree sought to be reversed was entered by agreement and consent, to which plea the plaintiff in error demurred, objecting that the party pleading could not show outside the record that the decree was rendered by consent, inasmuch as the record showed that it was rendered by default. But the court held the plea good, saying: "A decree which is entered by the agreement or consent of the parties, or their counsel, ought, more properly, to state that fact upon its face. 2 Daniell's Chan. Pl. & Prac. 1214. But we have found no authority for saying that that is indispensable, or that it can only be shown by the record that the decree was so entered." So far as we can find, this holding has never been overruled, modified or explained. The court, in

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the case cited, also say : "A decree by consent cannot be appealed from, nor can error be properly assigned upon it. Even a rehearing cannot be allowed in the suit, nor can the decree be set aside by a bill of review."

In Knobloch v. Mueller, 123 Ill. 554, 565, the court say : "Decrees of courts of chancery, in respect of matters within their jurisdiction, are as binding and conclusive upon the parties and their privies as are judgments at law; and a decree by consent, in an amicable suit, has been held to have an additional claim to be considered final. (Alleson v. Stark, 9 A. & E. 225.) Decrees so entered by consent cannot be reversed, set aside or impeached by bill of review or bill in the nature of a bill of review, except for fraud, unless it be shown that the consent was not, in fact, given, or something was inserted as by consent that was not consented to." Citing, Armstrong v. Cooper, and other authorities.

In Cox v. Lynn, 138 Ill. 195, 204, the court say : "A bill of review does not lie to vacate or review a decree entered by consent, unless the consent of the parties was obtained by fraud or mistake."

In First Nat. Bank v. Ill. Steel Co., 174 Ill. 140, 154, the court cite with approval Armstrong v. Cooper, and quote with approval the language, "a decree by consent cannot be appealed from," etc.

It has been held that, even when a consent decree has been induced by fraud, relief cannot be had on mere motion but only by original bill. 2 Daniell's Ch. Pl. & Pr. 5th ed. 1472; Ib. 973-4; Monell v. Lawrence, 12 Johns. Rep. 521, 534-5; Edney v. Edney, 81 N. C. 1; Harrison v. Rumsey, 2 Vesey Sr., top p. 488; Bradish v. Gee, Ambler's Chan. R. 229; Williams v. Neil, 4 Heisk. (Tenn.) 279.

In Monell v. Lawrence, *supra*, the court say : "There is, also, another objection to the mode adopted by the appellant to obtain relief in the court below, even if an application for relief could in any way be sustained; it is an attempt to set aside, upon motion, a decree entered by consent of parties. This is against the established mode of proceedings in chancery. The case of Harrison v. Rumsey

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(2 Ves. 488), came before the court upon petition, and Lord Hardwick said he would by no means set aside a decree obtained by consent of counsel on both sides, for it would be most dangerous, and it was an established rule not to do it nor would he make the precedent. There was, he said, a good while ago, an appeal of that kind in the house of lords, who desired the party to bring an action against the counsel; if they could prove a collusion on the counsel, it would be a different thing; and in the case of *Bradish v. Gee* (Ambler, 229), the same lord chancellor said, where a decree is made by consent of counsel, there lies not an appeal or rehearing, though the party did not really consent; but his remedy is against his counsel. But if such decree was by fraud and covin, the party may be relieved against it, not by rehearing or appeal, but by original bill."

In *Williams v. Neil*, *supra*, the court say: "It is well settled that there lies no appeal or rehearing from a decree by consent, and such decree can only be impeached by an original bill in the nature of a bill of review, when it has been obtained by fraud or imposition," citing cases. In *Karr v. Freeman*, 166 Ill. 299, the court held that an original bill, in the nature of a bill of review, is a proper remedy in a case in which a decree has been entered in violation of an agreement between counsel, and say: "So far as the jurisdiction of a court of equity is concerned, it can make no difference whether the agreement was violated by the complainant by fraud or mistake." Also, the language of the court in *Cox v. Lynn*, *supra*, namely: "A bill of review does not lie to vacate or review a decree entered by consent unless the consent of the parties was obtained by fraud or mistake," indicates that a bill of review, or bill in the nature of a bill of review, is the proper remedy in such case. It would seem to follow logically, from the unqualified opinion in *Armstrong v. Cooper*, that a decree by consent cannot be appealed from, nor a rehearing allowed, and that relief cannot be obtained on mere motion. The reason of the rule is thus stated in § Ency. of Pl. & Pr. 961, 962: "A consent decree is not, in a strict legal sense, 'a judicial

sentence,' but it is in the nature of a solemn contract and it is an elementary principle that it cannot be amended or in any way varied, without the like consent, nor can it be reheard in the court that rendered it, appealed from, nor reversed upon a writ of error or bill for review." * See, also, *McEachern v. Kerchner*, 90 N. C. 177, to the same effect.

We will next consider the charge of fraud. The only matter charged as fraud in Mr. Gilbert's affidavit is, that the defendant, after agreeing June 26, 1903, that he should have the custody of the child, Eddy Bert Krieger, one day in each week, and until the child's status, in respect to his parents, should be fixed by a court of competent jurisdiction, and under no circumstances should the child be kept from the complainant after dark, violated his agreement by taking the child with him to Germany, as the affiant has been informed and believes, for the purpose of secreting and placing the child beyond the jurisdiction of the court. In other words, that the defendant broke his alleged promise, on which the complainant relied, in agreeing to dismiss her bill. Was the alleged breach of promise a fraud which would warrant the court in vacating the decree of June 26, 1903, on the hypothesis that a motion was the proper remedy? We think not. There was no representation of any existing fact. Even though there was a false representation of intention, or that when the defendant made the alleged agreement or promise, he did not intend to keep it, this would not constitute fraud. *People v. Healy*, 128 Ill. 9. In the case cited the court quotes, with approval, the following from *Gage v. Lewis*, 68 Ill. 604: "It cannot be said that these representations and promises were false when made, for, until the proper time arrived, and the plaintiff refused to comply with them, it could not positively be known that they would not be performed. Even if, at the time they were made, it was not intended to comply with them, it was but an unexecuted intention, which has never been held, of itself, to constitute fraud. If they legally amount to anything, they constitute a contract." And in the same case it is said: "A promise

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to perform an act, though accompanied, at the time, with an intention not to perform, is not such a representation as can be made the ground of an action at law. The party should sue upon the promise."

In *Haenni v. Bleisch*, 146 Ill. 262, a father purchased a tract of land and procured conveyance thereof to his two daughters, Eva and Catherine. Subsequently, he requested Eva to convey to Catherine her undivided interest in the land, which Eva did, on her father's promise to pay to her in money the value of her interest so conveyed to Catherine. Her father did not keep his promise, and Eva filed a bill alleging fraud. The lower court dismissed the bill for want of equity, and the court affirmed the decree, saying, among other things: "If, therefore, a court of equity can be resorted to, on the facts here alleged, to annul a deed of conveyance to real estate, then in every case in which there is a breach of the vendee's contract to pay for the land conveyed, the vendor can avoid the deed. Certainly no one will contend that such is the law. A false representation, within the meaning of the law, 'must be as to a past or present state of facts—not merely as to an intention as to the future.' *Gage v. Lewis*, 68 Ill. 604, citing *Kerr on Fraud and Mistake*, 88, wherein it is said: 'As distinguished from the false representation of a fact, the false representation as to a matter of intention not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud in law.' Also, *Gallager v. Brunel*, 6 Cow. 346, holding 'that to warrant an action for a deceitful representation it must assert a fact or facts as existing in the present tense. A promise to perform an act, though accompanied at the time with an intention not to perform, is not such a representation as can be made the ground of an action at law. The party should sue upon the promise, and if this be void he has no remedy.'"

Counsel for defendant contend that the evidence is insufficient to support the decree of divorce, rendered May 4, 1904, and counsel for complainant contends that there is no proper certificate of evidence. In view of our conclusions, we do not deem it necessary to pass on these contentions.

Our conclusions are that the court erred in its order of July 18, 1903, in setting aside and vacating the decree of June 26, 1903, and reinstating the cause, and that all orders in the cause, including the divorce decree of May 4, 1904, entered after June 26, 1903, except the order of August 13, 1904, and the order allowing defendant an appeal from that order, were and are erroneous. Therefore, the order of July 18, 1903, vacating the decree of June 26, 1903, and reinstating the cause, and also all orders subsequent to June 26, 1903, including the decree of May 4, 1904, granting complainant a divorce, except the order of August 13, 1904, and the order granting defendant an appeal from that order, will be reversed, and our opinion being that the Circuit Court cannot, on motion, vacate or set aside the decree of June 26, 1903, the cause will not be remanded.

Reversed.

Mr. Justice BROWN took no part in the decision of this case.

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